Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EUGENIE PARNAR,

Petitioner,

v.

THE LAW OFFICES OF JOHN A. CHANIN,

Respondent.

On Petition for Writ of Certiorari to the Hawaii Supreme Court

PETITION FOR WRIT OF CERTIORARI

EUGENIE PARNAR
Petitioner Pro se
252 Paoa Place, #3-3
Honolulu, Hawaii 96815
(808) 955-5050

162 PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review constitutional law violations where the alternative is allowing blatant State Court nullification of State and Federal laws and United States Constitutional guarantees.

2. Whether a fraud upon the court judgment and record fraught with flagrant and manifest violations of a litigant's United States constitutional rights inherent to the administration of justice provide sufficient unconscionable abuse of power to warrant this Court's plenary de novo review when a State Supreme Court acts sovereign to the Constitution of the United States.

3. Whether the access to court guarantee of the United States Constitution is violated by Order of a State Supreme Court justice prohibiting the clerk from accepting further filings in an appeal.

PARTIES TO THE PROCEEDING

The names of the parties appear on the caption.[1]

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[1] Regarding John A. Chanin, the Respondent, on March 19, 1998, the Supreme Court of the State of Hawaii entered an Order Allowing Resignation in Lieu of Discipline and, therefore, The Law Offices of John A. Chanin no longer exists.

At the time the Hawaii Supreme Court was considering Petitioner's appeal, the State Office of Disciplinary Counsel, which is under the jurisdiction of the Hawaii Supreme Court, was conducting an investigation of attorney John A. Chanin which led to the Order Allowing Resignation in Lieu of Discipline. (Appendix VIII) Under the Rules of the Supreme Court of the State of Hawaii, Rule 2.14(d), the surrendering of his bar license constitutes a consent to disbarment for purposes of these rules.

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No. _____

In the Supreme Court
OF THE
United States

October Term, 1998

Eugenie Parnar,
Petitioner,

vs,

The Law Offices of John A. Chanin,
Respondent.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The Hawaii Supreme Court Notice of Entry of Judgment Upon Appeal is not reported, but is attached to this Petition. (Appendix I). The Hawaii Supreme Court Summary Disposition Order is reported at 87 Haw. 35, 950 P.2d 1235 (Haw. 1998), and is attached to this Petition. (Appendix II). The Judgment against Petitioner entered by the Circuit Court of the First Circuit of the State of Hawaii, is not reported, but is attached to this Petition. (Appendix III) The Order of the Circuit Court of the First Circuit of the State of Hawaii Denying Petitioner's Motion to Open and Amend Judgment, is not reported, but is

attached to this Petition. (Appendix IV) The Order of the Circuit Court of the First Circuit of the State of Hawaii Granting Plaintiff's [Respondent] Motion for Sanctions is not reported, but is attached to this Petition. (Appendix V) The Order of the Hawaii Supreme Court prohibiting the clerk from accepting further filings is not reported, but is attached to this Petition. (Appendix VII).

STATEMENT OF THE BASIS OF JURISDICTION

The Notice of Judgment on Appeal of the Hawaii Supreme Court in this case was entered February 17, 1998. (Appendix I)

It is the final judgment from the highest court of the State of Hawaii. No rehearing has been requested, ordered, or denied.

Jurisdiction is conferred on this Court with regard to this Petition by 28 USC Section 1257(a), Article III, Section 2 of the United States Constitution, and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THE CASE

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment of the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

> any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Following the Preamble, the State of Hawaii Constitution states that "[t]he Constitution of the United States of America is adopted on behalf of the people of the State of Hawaii."

Article I, Section 5 of the Hawaii Constitution provides:

> Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Article I, Section 13 of the Hawaii Constitution (former Article I, Section 10, as amended with respect to the amount in controversy) provides:

> In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

Rule 38(a), Federal Rules of Civil Procedure, provides:

> Rule 38. Jury Trial of Right
>
> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the

Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 38(a), Hawaii Rules of Civil Procedure, provides:

Rule 38. JURY TRIAL OF RIGHT

(a) Right Preserved. The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

On June 18, 1990, John A. Chanin, Respondent herein filed a complaint in the First Circuit Court of Hawaii claiming a balance of $24,431.88 in attorney fees still owing after taking $45,545.68 from the trust account of his client, Eugenie Parnar, Petitioner herein. Petitioner filed an answer and counterclaim on July 9, 1991, charging him with breach of his fee agreement, false and fraudulent billings, and legal malpractice. Respondent made misrepresentations, increased his hourly rate without notice, submitted false and fraudulent billings, including entry for 55 hours in one day for one attorney work and engaged in negligent representation of Petitioner causing her substantial damages. Petitioner requested a jury trial.

Respondent noticed Petitioner's deposition for December 4, 1991, and thereafter "day to day until completed." When Petitioner and her attorney attended the deposition, Respondent began questioning abusively, then, with no advance notice, suddenly announced that he had to terminate the deposition, saying he had to leave at 11:30 a.m. that day to go to the airport to catch a flight to the

mainland. The record further reveals that Respondent's conduct of the deposition was harassing and abusive as he asked totally irrelevant and obnoxious questions before abruptly stopping it. As presented in the Opening Brief (Appendix IX) and provided by the record, Respondent asked no questions about Respondent's services as her attorney, Petitioner's alleged outstanding legal bills, Respondent's malpractice, or anything whatsoever about the allegations in the complaint or counterclaim.

Petitioner thereafter filed a motion to terminate the deposition. At the hearing on Petitioner's motion, the court found the questioning irrelevant and a waste of time. The court did not terminate the deposition, but ordered limitations on Respondent's deposition tactics. Although ordered to prepare the order, Respondent never did and it was never entered.

Petitioner thereafter declined to submit to a deposition due to the absence of a written limiting order; Respondent's failure to take the deposition on court ordered dates; his failure to return Petitioner's files so that she could prepare for the deposition; and after Petitioner's attorney withdrew, because then she was without legal representation. Respondent filed motions to compel which were heard before different judges and he misrepresented to each court what other judges had previously ruled. He told one court that the limiting order had been filed when the record provides it had never been filed. Respondent attributed statements to judges that appear nowhere in the record or transcripts of proceedings. When Respondent obtained an oral order limiting the deposition to specific dates, he failed to notice Petitioner's deposition for those dates.

Later, Respondent again noticed a deposition and served Petitioner with a subpoena duces tecum when her attorney withdrew leaving her without counsel. Petitioner sought a protective order to continue her deposition until she found an attorney and obtained her files from Respondent. While the court ordered Petitioner to submit to a deposition on March 22, 1995, a written order was never entered from which Petitioner could seek appellate review.

Petitioner complied with his subpoena duces tecum and timely notified Respondent by letter that she could not submit to a deposition without counsel and without Respondent returning her files and she needed the entry of an order so that she could seek appellate review.

Respondent immediately filed a motion seeking sanctions on Petitioner for failure to appear at the deposition even though no written order was ever entered.

Petitioner, pro se, timely filed her Memorandum in Opposition to [Respondent's] Motion for an Order Imposing Sanctions Upon [Petitioner] for Failure to Submit to The Taking of Her Deposition, filed March 24, 1995. (Appendix XI).

In making her objections, Petitioner argued that Respondent's motion for sanctions under Rule 37, Hawaii Rules of Civil Procedure ("HRCP") was an attempt to thwart her right of constitutional due process; that Respondent himself had engaged in unfair and inequitable conduct by disregarding Rule 23, Hawaii Rules of the Circuit Courts (which mandate submission of proposed orders for entry) by failing to submit orders; that by refusing to return her files, her right to fair preparation for deposition and trial was jeopardized; that Respondent was

not entitled to any sanctions and certainly not dismissal of her counterclaim, based on the law and special circumstances of this case; and that dismissal of her counterclaim and entry of default would be a denial of her right to a hearing on the merits in this case and would violate her fundamental constitutional rights including her right to jury trial. Petitioner argued particularly that entry of the order was needed in order for her to seek immediate appellate review of the violations of her constitutional rights as therein outlined and that failure to enter orders violated her constitutional right to seek appellate review.

At the hearing, Petitioner, pro se, argued that there was no order entered by the court on her motion for protective order which she needed in order to seek appellate review. She provided that as cited in her memorandum, the *Chuck v. St. Paul Fire and Marine Ins. Co.*, 61 Haw. 552, 606 P.2d 1320, 1321 (Hawaii 1980) and *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct., 1221, 93 L.Ed 1528 (1949) cases indicated that she had a right to seek appellate review under the collateral order doctrine on the Court's decision denying her motion for protective order.

Despite the constitutional arguments and other issues raised by Petitioner in her memorandum in opposition and at the hearing, the court granted Respondent's motion and imposed the harshest of sanctions, dismissing Petitioner's counterclaim with prejudice, and entry of default against Petitioner on Respondent's claim without making any findings of bad faith, wilful disobedience, or fault. (Appendix V)

Subsequently, without notice or hearing, the court entered judgment in favor of Respondent in the amount of $24,431.88, plus additional elements including prejudgment

interest, attorneys' fees and costs without proof of those amounts. The judgment mushroomed to $47,346.26. (Appendix III)

Petitioner, pro se, filed a motion to open and amend the judgment and for new trial, arguing that the judgment was void and should be vacated because it was entered without notice and an opportunity to be heard as required by Hawaii Rules of Civil Procedure ("*HRCP*"), Rule 55(b)(2), before entry of judgment; without any proof hearing; without the amount of the judgment being substantiated; and based on newly discovered evidence of Respondent's conflict of interest. The trial court denied Petitioner's motion and *denied her any proof hearing*, right to jury trial, and her right to contest the amount of the judgment. Respondent was ordered to draft the order. The Court entered, over Petitioner's objections,[2] Respondent's proposed order replete with an erroneous statement of facts. The order (Appendix IV) failed to address Petitioner's argument based on constitutional violations.

Petitioner, pro se, timely filed a notice of appeal from the judgment and order denying her motion to open and amend the judgment. In her Opening Brief, (Appendix IX)[3], Petitioner argued that the lower court judgment was

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[2] Petitioner's memorandum in opposition to the proposed order denying her motion is not attached because it is fully addressed in the Opening Brief (Appendix IX).

[3] The exhibits attached to the Opening Brief are not included in this Appendix as it is not feasible at this time to format them in compliance with the Supreme Court's requirement that text be no smaller than 12 point type in the body and 10 point type in footnotes while maintaining the nature, content, and readability, of the original documents which can be provided if necessary.

obtained by fraud on the court and should be vacated; that she was justified in not submitting to a deposition without counsel and files; that she was not found to have acted willfully or in bad faith justifying the drastic action of default and dismissal; that she was not warned of sanctions prior to default with a less drastic sanction being considered; that the judgment was improperly entered as it was signed by a different judge than the judge that conducted the hearing; and that thus she was denied her constitutional right to due process as guaranteed her under the United States Constitution and the Hawaii Constitution.

Respondent filed an untimely Answering Brief without rebutting Petitioner's arguments and points of error in the Opening Brief and without citing any cases.

Petitioner, filed her Reply Brief (Appendix X) further addressing the fraud upon the court committed by Respondent, who completely failed to rebut Petitioner's arguments and points of error, and her request that the Hawaii Supreme Court, pursuant to rules of court and the Constitution, afford relief from attorneys who perpetrate fraud upon the court, use abusive litigation practices, and ignore court rules and orders and that these constitute a clear and undisputable flagrant abuse of her rights inconsistent with Constitutional guarantees and the administration of justice.

On January 27, 1998, the Hawaii Supreme Court entered its summary disposition order (Appendix II) denying her appeal and furthering the violation of her Constitutional rights under the Fourteenth Amendment to the United States Constitution and due process and equal protection under Article I, Section 5 of the Hawaii State Constitution.

On February 17, 1998, the Hawaii Supreme Court entered its judgment on appeal (Appendix I) from which this Petition for Writ of Certiorari is filed.

ARGUMENT

I.

THIS COURT SHOULD REVIEW THE CONSTITUTIONAL LAW VIOLATIONS WHERE THE ALTERNATIVE IS ALLOWING BLATANT STATE COURT NULLIFICATION OF STATE AND FEDERAL LAWS AND UNITED STATES CONSTITUTIONAL GUARANTEES.

"The guaranty of due process found in the Fifth Amendment of the Federal Constitution declares that no person shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law." The Fifth Amendment is a limitation upon the powers of Congress, while the Fourteenth Amendment is a limitation upon the powers of the states." 16 Am Jur 2d, Constitutional Law, pg. 951.

Petitioner herein, in vindication of her Federal constitutionally protected rights, brings before this court a fraud upon the court judgment to request a Writ of Certiorari. Title 28 U. S. C. § 1257(a), provides that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where any title, right, privilege or immunity is specially set up or claimed to be violated under the Constitution. All courts

state and federal are mandated to apply United States Constitutional law. *Rodriguez v. Westlab, Inc.*, 833 F.Supp. 425, 428 (S.D.N.Y. 1988).

The summary ruling by the Hawaii Supreme Court, without opinion, Appendix II of this Petition, validates a void, fraud upon the court judgment in selective application of the law, is repugnant to and violates the Constitution of the United States. It is the duty of the Circuit Court of Hawaii and the Hawaii Supreme Court, the State's highest court to apply constitutional law and prevent the perpetration of fraud upon the court to obtain a judgment in violation of due process. United States Constitutional due process analysis can only conclude that fraud upon the court by an attorney and officer of the court resulting in a fraudulent judgment cannot stand. Fraud vitiates every transaction tainted by it, even the solemn judgment of courts of record. *Crow v Crow*, 485 S.W.2d 928, 931 (C.C.A. Texas 1972). Where fraud vitiates a judgment or decree then it cannot stand; fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. *Groves v. Witherspoon*, 379 F. Supp. 52, 59, 61 (E.D.Tenn. 1974). Where a default judgment is the result of fraud on the court it is void and must be set aside as a nullity. *Trehan v. Von Tarkanyi*, 85 B.R. 920, 921, 933 (S.D.N.Y. 1988). Relief from void judgments is not discretionary, it is mandatory. *Orner v. Shalala*, 30 F. 3d 1307, 1310 (10th Cir. 1994).

Entry of a judgment because of fraud on the court and the judicial errors violate the due process constitutional rights to have matters fairly adjudicated. When the Hawaii Supreme Court by its Summary Disposition Order and the Notice of Judgment on Appeal, affirmed the void judgment based on fraud upon the court, it furthered the violation of

Petitioner's right to have matters fairly adjudicated, and her due process constitutional rights were violated.

Petitioner bases her argument on *Leavitt v. Jane L. et. al.*, 518 U S 137, 116 S Ct 2068, L Ed 2d 443 (1996), wherein at pages 144 and 145, this Court provided that it does not normally grant petitions for certiorari solely to review application of state law by a federal court of appeals, but this Court should undoubtedly do so where the alternative is allowing blatant federal-court nullification of state law.

Similarly to *Leavitt*, this Court is requested to give certiorari standing to an extraordinary case based on a failure of a State court to apply state and federal law and is urged to exercise its inherent plenary power of de novo review of a fraud upon the court erroneous judgment affirmed by a State Supreme Court where the alternative is allowing blatant state court nullification of State and Federal laws and Constitutional guarantees of State and Federal Constitutions.

It is in the context of the Supreme Court's "plainly wrong" interpretation in *Leavitt*, *Id.*, at 144 and 145, that this case falls and presents a State Supreme Court's equivalently clear refusal to apply State and Federal law by giving standing to a fraud upon the court judgment, which has the kind of national significance for the grant of certiorari and the typical predicate for exercise of Supreme Court jurisdiction. The upholding of fraud upon the court by an attorney as an officer of the court, is "plainly wrong" by any standard and frustrates all laws, statutes, and legislative intent pertaining to fraud and fraud upon the court, and constitutional guarantees of due process.

The *Leavitt* Court, *Id.*, at 145, provided that the general presumption of the United States Supreme Court that Federal Courts of Appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing such questions in most cases, not a belief that the courts of appeals have some natural advantage in that domain. The court stated further at 145:

> That general presumption is obviously inapplicable where the court of appeals' state-law ruling is "plainly wrong."

The decision of the Hawaii Supreme Court was "plainly wrong" in affirming a "plainly wrong" lower court judgment. The Hawaii Supreme Court by summarily affirming the lower court's judgment against Petitioner nullified State law and State and United States Constitutional guarantees of due process, equal protection, fair hearing, and fundamental fairness. This constituted a judicial abuse of power.

Petitioner had a judgment entered against her without notice and opportunity to be heard on its contents. This violates her due process rights under the United States Constitution. In *Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450 (S.D. Fla. 1988), the court in providing that a person must be given minimal due process before judgment can be entered against such person, stated at page 455 that:

> A fundamental aspect of constitutional law is the providing of minimal due process to an individual who could have an interest affected by the outcome of a litigation. A court, therefore, must assure that these affected individuals are provided with notice of the action and an opportunity to be heard.

Petitioner had decisions against her made by lower courts but written orders were not entered from which Petitioner could exercise her right to seek interlocutory appellate review. Petitioner cited in her Memorandum in Opposition to Sanctions (Appendix XI), *Chuck, supra,* 606 P.2d at 1321 which recognized that a party could seek interlocutory review of an order without waiting until final adjudication. Petitioner argued that she had a right to entry of orders so that she could exercise her right to seek review of them. The court ignored this in entering judgment against her, when a written order had never been entered from which she could seek reconsideration or appellate review, thus denying her due process rights.

Relevant documents throughout the record substantiate Petitioner repeatedly argued in protection of her Federal due process and equal protection constitutional rights. In her objections to Plaintiff's proposed order denying her motion to open and amend judgment entered January 11, 1996, filed February 20, 1996, Petitioner provided:

> This repeated false certification by [Respondent] and his not serving me in accordance with the Hawaii Rules of Civil Procedure ("HRCP") denies me my rights to the Rules as applicable to every other individual, my rights to fair procedure and fair hearing, violates due process and equal protection rights guaranteed every individual by the Hawaii Constitution and the Constitution of the United States, and for the Court to look aside and give Plaintiff carte blanche noncompliance exemption to the rules because he is an officer of the court is class-based invidious discrimination and violates my civil rights.

Petitioner asserts she has the right to honest, fair and equal administration of laws and protection of her constitutional rights and any denial of her right to a conscientious and fair administration of the judicial process by a court as required by law is an interference of her Fourteenth Amendment rights under the United States Constitution.

This Court should exercise its discretion under its own Rule 10 to review "plainly wrong" federal constitutional violations resulting from the judgment procured by fraud upon the court, violations of due process, equal protection, fair hearing and fundamental fairness, and denial of Petitioner's the right to a trial by jury.

The "plainly wrong" entry of judgment violated Petitioner's rights of due process, liberty, property, and to a trial on the merits. The right to one's "day in court" is one of the most fundamental of constitutional rights. Nonetheless, without admonition, the State court disregarded these rights by upholding abuse of process and obstruction of justice, dismissed Petitioner's counterclaim, and entered default against her, thus denying Petitioner her "day in court," the harshest of sanctions.

This court addressed the issue of "whether Fifth amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 210, 78 S.Ct. 1087, 78 L.Ed. 2d 1255 (1958). This Court concluded that "[t]he findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy

fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211. "[W]e think that [Federal Rules of Civil Procedure] Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and *not to willfulness, bad faith, or any fault of petitioner*." *Id.* at 212 (emphasis added).

Petitioner did not act with willfulness, bad faith, or fault. Given Respondent's previous abusive deposition tactics, she could not submit to a second deposition without counsel to represent her; without Respondent's return of her files in the underlying suit which would allow her to prepare; and without Respondent submitting the earlier limiting order regarding the taking of her deposition.

Despite this, and Respondent's repeated misrepresentations to the court as evidenced in the record, which the court ignored, the harshest of sanctions were imposed on Petitioner in denial of her constitutionally protected rights to due process under the Fourteenth Amendment and particularly her right to jury trial on the merits.

The court in reversing the striking of a claimant's filings and the granting of judgment, provided in *Degen v. United States*, 517 U.S. 820, 116 S.Ct. 1777 (1996) at page 828:

> The right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue.

* * * *

> It remains the case however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.

A judgment is void if it violates due process. *Orner v. Shalala*, 30 F.3d 1307 (10 Cir. 1994). Due process requires that the harsh sanction of dismissal be predicated on willfulness, bad faith, or fault. *Archibeque v. Atchison, Topeka and Santa Fe Ry. Co.*, 70 F.3d 1172 (10 Cir. 1995).

In Petitioner's case, these due process predicates were not met.

Accordingly, the Petition for Writ of Certiorari should be granted to protect Petitioner's constitutional right of due process, equal protection, fundamental fairness, jury trial, and fair access to adjudication as nullified by the State lower court and Supreme Court by entry of the judgment, based on fraud upon the court and contrary to fundamental fairness which violated Petitioner's State and United States constitutional rights.

II.

A FRAUD UPON THE COURT JUDGMENT AND RECORD FRAUGHT WITH FLAGRANT AND MANIFEST VIOLATIONS OF A LITIGANT'S UNITED STATES CONSTITUTIONAL RIGHTS INHERENT TO THE ADMINISTRATION OF JUSTICE PROVIDE SUFFICIENT UNCONSCIONABLE ABUSE OF POWER TO WARRANT THIS COURT'S PLENARY DE NOVO REVIEW WHEN A STATE SUPREME COURT ACTS SOVEREIGN TO THE CONSTITUTION OF THE UNITED STATES.

This case presents the issue whether the affirmance of a fraud upon the court judgment and flagrant and manifest violations of a litigant's due process rights inherent to the administration of justice provides sufficient unconscionable abuse of power to warrant this Court granting a Writ of Certiorari.

This Court had the issue of fraud upon the court before it in *Hazel-Atlas Glass v. Hartford Empire*, 322 U.S. 238, 246, 64 S.Ct. 997, 1003, 88 L.Ed 1250, 1256 (1944), which rendered, page 244, that where enforcement of a judgment is "manifestly unconscionable," a federal court will wield the power over judgments to correct injustices. This Court further, page 245, recognized that:

> Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.

In *Root Refining v. Universal Oil Products*, 169 F.2d at 522 (3d Cir. 1948), the Court at page 518 provided that,

"the inherent power of a federal court to investigate whether a judgment has been obtained by fraud is without question." The Court further recognized that fraud upon the court "is a wrong against the institutions set up to protect and safeguard the public. *Id.*, at 522.

"Fraud, misrepresentation, and circumvention used to obtain a judgment, are generally regarded as sufficient cause for the opening or vacating of the judgment [.]" *Southwest Slopes v. Lum*, 81 Haw. 501, 511, 918 P.2d 1157 (App. 1996). "The possibility that Plaintiffs used fraud upon the court when obtaining the summary judgment in their favor," ruled the Hawaii Intermediate Court of Appeals, "motivates us to vacate and remand." *Id.*; *see also*, *Magoon v. Magoon*, 70 Haw. 605, 616, 780 P.2d 80 (1989) ("a court has inherent power to investigate whether a judgment was obtained by fraud"); *State v. Martin*, 56 Haw. 292, 294, 535 P.2d 127 (1975) ("implicit in the proper and orderly administration of justice"); *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285 (1978) ("the appropriate action to be taken in a case of fraud upon the court is for the injured party to seek [relief] from the judgment of the court.")

In *Hazel-Atlas Glass, supra*, page 246, this Court addressed fraud on the court and lawyers in classic language by Mr. Justice Black:

> [T]ampering with the administration of justice in the manner indisputably shown here involves more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

"Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." *Id.* at 245;

"A number of courts have relied on *Hazel-Atlas* as authority for the proposition that involvement of an attorney in the perpetration of the fraud is a key factor in the existence of fraud upon the court." 47 Am.Jur.2d, Judgments, Section 891 at 365 (1984). Professor Moore states the following about *Hazel Atlas*:

> [A]n attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for, while an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

Moore & Lucas, *Moore's Federal Practice*, V. 7, Section 60.33 at 60-359 (1982). "Fraud on the court," notes Professor Moore, "is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner[.]" *Id.* at 60-360; *see also*, *Haner v. Haner*, 373 P.2d 577, 579 (Utah 1962) (false statements by lawyers that prevent a party from prosecuting a claim or defense constitute fraud on the court.)

Defaults obtained by fraud upon the court are particularly vulnerable to reversal. "[D]ismissal of a pending action by the trial court with prejudice is not favored." *Azer v. Courthouse Racquetball Corp.*, 9

Haw.App. 530, 540, 852 P.2d 75 (1993); *see also* Wright, Miller and Kane, *Federal Practice and Procedure*, Civil 2d, V. 9, Section 2681 at 402 (1983) ("defaults are not favored by the law and any doubts usually will be resolved in favor of the defaulting party"); *Trehan, supra* at 921 ("as a result of the fraud perpetrated by the Trehans the default judgment is void"); *Anno*, 78 A.L.R.3d 150 (1962), "Fraud in Obtaining or Maintaining Default Judgment as Grounds for Vacating or Setting Aside Judgment in State Courts."

Judgments are not vacated merely because perjured evidence is introduced at a hearing. *Chisom v. Stephenson* 363 P.2d 229, 232 (Okla. 1961). "[I]t must be such fraud as to prevent the other from having a trial on the issues." *Id.* "Fraud upon the court embraces," declared the Montana Supreme Court recently:

> only that species of fraud which subverts or attempts to subvert the integrity of the court itself, *or fraud perpetrated by officers of the court* so that the judicial machinery cannot perform in an impartial manner. *In re Marriage of Miller*, 902 P.2d 1019, 1022 (Mont. 1995) (emphasis added).

"Fraud upon the court includes only the most egregious conduct," said the court, "such as the fabrication of evidence in which an attorney has been implicated[.]" *Id.* "[I]f our adversary system is to function according to design," said Justice Marshall in *Geders v. United States*, 425 U. S. 80, 93, 96 S.Ct. 1330, 1333, 47 L. Ed. 2d 592, 602 (1976), "we must assume that an attorney will observe his responsibilities to the legal system."

Respondent tainted every ruling in this case by repeatedly making misrepresentations and fabricating evidence in court documents and hearings, specific instances of which were outlined in Petitioner's Opening and Reply Briefs, which resulted in a judgment against Petitioner and dismissal of her counterclaim. Respondent, by filing false documents and making misrepresentations "perpetrated a fraud upon the court." *People v. Radinsky*, 490 P.2d 951, 953 (Colo. 1971). The *Radinsky* court declared at page 952:

> If acts of this type that the respondent has committed are not promptly and severely punished, the public will not have reason to trust lawyers that maintain the high standards of our profession.
>
> * * * *
>
> Since a lawyer is an officer of the court, we cannot tolerate or allow fraud by a lawyer to go unpunished.
>
> * * * *
>
> Our most sacred duty is to maintain the integrity of the law profession by disciplining lawyers who indulge in practices which are designed to perpetrate a fraud on the courts.

See also, *In re French*, 28 Haw. 47, 59 (1924) (attorney disbarred for giving "deliberately false" testimony.)[4]

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[4] See also, *Virgin Islands Housing Authority v. David*, 823 F.2d 764, 767 (3d Cir. 1987) ("we believe that Maduro's argument perpetrated fraud upon the district court"); *Porter v. Goodyear Tire and* (continued...)

The use of fraud, misrepresentation, and circumvention to obtain a judgment constitute cause for opening or vacating a judgment. *Southwest Slopes, supra*, page 511. Further, a judgment obtained by fraud is a "void judgment" and may be attacked at any time by any court. *Rook v. Rook*, 353 S.E.2d 756, 758 (Va. 1987).

This Court is requested to exercise its discretion to determine that the judgment against Petitioner was void, "plainly wrong," constitutionally defective, and set it aside.

In doing so, this Court is respectfully requested to review the record and the fraud upon the court committed by an attorney, officer of the court, in light of its own independent judgment without giving special weight to the State court decisions. *U.S. v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990). Particularly this Court should review constitutional questions *de novo*. *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996).

The judgment entered against Petitioner based on Respondent's fraud upon the court conduct is void, violates

---

[4](...continued)
Rubber, 536 F.2d 1115, 1119 (6th Cir. 1976) ("since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court"); *Lockwood v. Bowles*, 46 F.R.D. 625, 633 (D.C.D.C. 1969) ("when [an attorney] departs from that standard in the conduct of a case he perpetrates a fraud upon the court"); *England v. Doyle*, 281 F.2d 304, 306 (9th Cir. 1960) ("unconscionable plan or scheme which is designed to improperly influence the court"); *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1338 (5th Cir. 1978), (fabrication of evidence by a party in which an attorney is implicated is fraud upon the court"); *In re Intermagnetics America*, 926 F.2d 912, 916 (9th Cir. 1991) ("fraud upon the court includes both attempts to subvert the integrity of the court and fraud by an officer of the court.")

due process under the Fourteenth Amendment to the United States Constitution, and warrants *de novo* review by this Court.

III.
THE ACCESS TO COURT GUARANTEE OF THE UNITED STATES CONSTITUTION IS VIOLATED BY ORDER OF A STATE SUPREME COURT JUSTICE PROHIBITING THE CLERK FROM ACCEPTING FURTHER FILINGS IN AN APPEAL.

Subsequent to the Hawaii Supreme Court's Notice of Judgment on Appeal, Respondent herein resigned the practice of law in lieu of discipline. The Hawaii Supreme Court's Order Allowing Resignation in Lieu of Discipline was entered March 19, 1998, Appendix VI. Under Rule 2.14, Hawaii Supreme Court Rules, it is a disbarment for all purposes under these rules.

On March 20, 1998, in accordance with the Order Allowing Resignation in Lieu of Discipline, Michael T. Lee, Assistant Disciplinary Counsel of the Office of Disciplinary Counsel ("ODC"), published on March 20, 1998, To All State and Federal Judges in Hawai'i, a Notice concerning Attorney John A. Chanin, which stated:

> Administrative Judges are asked to take such action as is deemed necessary to protect the rights of any clients of Mr. Chanin whose cases may be pending court.

A copy of the notice is attached as Appendix VIII.

This Court is respectfully requested to take the action requested herein to protect the rights of Petitioner, a former client of Respondent and victim of his conduct.

On April 12, 1996, Petitioner filed in the Hawaii Supreme Court her emergency motion for stay of enforcement of final judgment on appeal pending obtaining the ODC records and to remove from the lower court calendar Respondent's motion to terminate stay, to distribute funds from Petitioner's cash deposit in lieu of appeal bond, and for attorney's fees and costs on appeal.

The Order regarding that Motion dated April 8, 1998, attached hereto as Appendix VII, provides:

> IT IS HEREBY ORDERED that the motion is stricken.
>
> IT IS FURTHER ORDERED that the Clerk shall accept no further filings in this appeal.

Petitioner argues that this Order prohibiting further filings violated the access to court guarantee of the United States Constitution. That right is:

> fundamental and is protected by the United States Constitution whether the claim arises under state or federal law. The right is grounded in the First Amendment right to petition the government for redress, the Article Four protection of privileges and immunities, and the due process clause of the Fourteenth Amendment.

ACLU v. Mabus, 719 F.Supp. 1345, 1358 (S.D. Miss. 1989), vacated 911 F.2d 1066 (5th Cir. 1990); reh. den. 919 F.2d 735 (5th Cir. 1990).

It is a well-established rule that once a State, or the Federal Government establishes procedures of appellate review, it must insure equal and open access to those procedures for all appellants. *Rinaldi v. Yeager*, 384 US 305, 86 S Ct. 1497, 16 L. Ed. 2d 377 (1966); *Griffin v. Illinois*, 351 U.S. 12, 100 L. ed 891, 76 S Ct. 585, 55 ALR2d 1055 (1956); *Douglas v. California*, 372 US 353, 83 S Ct. 814, 9 L. Ed 2d 911, (1962); *Lane v Brown*, 372 US 477, 83 S Ct. 768, 9 L Ed 2d 892 (1963); *Draper v. Washington*, 372 US 487, 833 S Ct 774, 9 L Ed 2d 899 (1963).

Litigants, like Petitioner, should have an adequate opportunity to represent their claims fairly within the legal system. The order prohibiting such access is an unconstitutional abridgment or impairment of a litigant's rights of access to the courts, a principle derived from constitutional guarantees of due process and equal protection. This Court, in *Bounds v Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L. Ed. 2d 772 (1977), recognized that access to the courts must be adequate, effective, and meaningful.

Petitioner provides that the liberty guarantee of the United States is violated by the prohibition of filing of court documents; that documents should be able to be filed without interference; and that the court cannot suppress or pass judgment upon legal documents prior to filing in the court, and that to do so constitutes an abridgment of a litigant's rights to petition the government for redress of grievances under the First Amendment to the United States

Constitution and a violation of the due process and equal protection rights of the Fourteenth Amendment.

Rinaldi, Id. 384 US 305, 16 L.Ed 2d 577, 581, 86 S Ct 1497, provided:

> [5] This Court has never held that the States are required to establish avenues of appellate review, but is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois,* 351 U.S. 12, 100 L Ed 891, 76 S Ct 585, 55 ALR2d 1055; *Douglas v California,* US 353, 9 L ed 2d 899, 83 S Ct 774.

The Hawaii Supreme Court by prohibiting further filings violated Petitioner's rights of due process and court access because Petitioner is no longer able to exercise her right to further petition the State Supreme Court for reconsideration of that prior order or other relief.

CONCLUSION

This Court is urged to grant certiorari because the subject matter of the Petition has significant public interest; the case involves legal principles of major significance to the jurisprudence of the State; and, the decision of the State Supreme Court allowing a fraud upon the court judgment to stand is in conflict with fraud upon the court decisions in other States.

The unpublished decision by the Hawaii Supreme Court without opinion refused to address any of the fraud on the court cases and federal and state laws and Constitutional

violations Petitioner raised in her defense and cited in her Opening and Reply Briefs.

The decision affirmed the right of State circuit court judges to uphold a judgment procured by fraud despite the record and numerous cases cited rendering such action as contrary to law and the Constitutions of the United States and the State of Hawaii. The decision looked aside to the rendering of written orders, adherence to rules of court and civil procedure, openly defied due process, and rewarded Respondent against every attempt by Petitioner to defend against his fraudulent action.

The Hawaii Supreme Court approved these judicial violations and approved the judgment—that under the law was a void judgment—and which violated Petitioner's due process rights and right to jury trial on the merits under the Constitutions of the United States and the State of Hawaii. The Hawaii Supreme Court affirmed a void judgment based on the violations of state and federal laws and constitutional protections. This judgment denied Petitioner her constitutional rights and this Court should grant the Petition in order to fully review what was "plainly wrong."

Respectfully submitted,
Eugenie Parnar
252 Paoa Place, #3-3
Honolulu, Hawaii 96815
808/955-5050
Pro se

APPENDIX

Appendix I
All orders are from courts of the State of Hawaii
Supreme Court Notice of Entry of Judgment on Appeal

S.C. No. 19946

IN THE SUPREME COURT OF
THE STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff-Appellee,

vs.

EUGENIE PARNAR,
Defendant-Appellant.

EUGENIE PARNAR,
Counterclaimant and Appellant,

vs.

THE LAW OFFICES OF
JOHN A. CHANIN,
Counterclaim-Defendant and Appellee.

Civil No. 90-1843

APPEAL FROM THE

1) THE JUDGMENT FILED ON JANUARY 11, 1996,
AND

2) THE ORDER DENYING DEFENDANT EUGENIE PARNAR'S MOTION TO OPEN AND AMEND JUDGMENT ENTERED JANUARY 11, 1996, FILED MAY 24, 1996.

FIRST CIRCUIT COURT

HON. Robert G. Klein
HON. Francis Q.F. Wong
HON. Russell Nnagata
HON. Barry Kurren
HON. Thomas Kaulukukui, Jr.
HON. Virginia L. Crandall
HON. Kevin S.C. Chang
HON. Wilfred K. Watanabe
HON. Colleen K. Hirai
HON. Herbert Shimabukuro
HON. Wendell K. Huddy
HON. Karen N. Blondin
HON. Gail C. Nakatani
HON. Danial G. Heely
Judges

[Filed]
[1998 Feb - 17 9:24 AM]
[L. Nakagawa]
[Clerk Supreme Court]

NOTICE OF JUDGMENT ON APPEAL

TO THE HONORABLE PRESIDING JUDGE OF THE FIRST CIRCUIT COURT.

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the summary disposition order of the Supreme Court entered on January 21, 1998 the Judgment filed on January 11, 1996, and the Order Denying Defendant Eugenie Parnar's Moion to Open and Amend Judgment entered January 11, 1996, filed May 24, 1996 are affirmed.

DATED: Honolulu, Hawaii, FEB 17 1998.

BY THE COURT:

[L Nakagawa]
[Clerk Supreme Court]

APPROVED:

/s/ MARIO R. RAMIL
JUDGE

Appendix II
Supreme Court Summary Disposition Order

No. 19946

IN THE SUPREME COURT OF
THE STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff-Appellee,

vs.

EUGENIE PARNAR,
Defendant-Appellant.

EUGENIE PARNAR,
Counterclaimant and Appellant,

vs.

THE LAW OFFICES OF
JOHN A. CHANIN,
Counterclaim-Defendant and Appellee.

Civil No. 90-1843

FIRST CIRCUIT COURT

[Filed]
[1998 Jan - 21 10:43 AM]
[K. Miyamura]
[Clerk Supreme Court]

SUMMARY DISPOSITION ORDER

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties,

IT IS HEREBY ORDERED that the judgment(s) or order(s) from which the above-captioned appeal is taken is hereby affirmed.

DATED: Honolulu, Hawaii, January 21, 1998.

On the briefs:

Peter Van Name Esser
(on the opening brief)
for Defendant-Appellant/
Counterclaimant and
Appellant

John A. Chanin
Plaintiff-Appellee
Counterclaim-Defendant
and Appellee, Pro Se

Eugenie Parnar
(on the reply brief),
Defendant-Appellant and
Counterclaimant Pro Se

/s/ Ronald T.Y. Moon
/s/ Steven H. Levinson
/s/ Paula A. Nakayama
/s/ Mario R. Ramil
/s/ Michael A. Town

Appendix III
Judgment of the Circuit Court of the First Circuit

THE LAW OFFICES OF
JOHN A. CHANIN

JOHN A. CHANIN 650-0
2618 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808)538-1637
Facsimile: (808) 532-1401

Attorney for Pro Per

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff,

vs.

EUGENIE PARNAR,
Defendant.

CIVIL NO. 90-1843-06
(Contract)

JUDGMENT
EXHIBITS "A" - "B"

[Filed]
[1996 Jan - 11 4:04 PM]
[F. Otake]
[Clerk]

JUDGMENT

Plaintiff THE LAW OFFICES OF JOHN A. CHANIN's Motion for Sanctions Against Defendant EUGENIE PARNAR having come on for hearing before the Honorable Wendell K. Huddy on April 19, 1995, at 10:30 a.m. and the Order Granting Plaintiff's Motion for Sanctions against Defendnat EUGENIE PARNAR having been entered on August 8, 1995; and

Based upon the affidavits, pleadings and files therein, with good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Plaintiffs THE LAW OFFICES OF JOHN A CHANIN, and against Defendant EUGENIE PARNAR in the principal amount of $24,431.88, plus pre-judgment interest of $13,437.55, plus attorneys' fees of $7,581.46 and costs of $1,895.37.

All other claims and counter-claims are hereby dismissed.

DATED: Honolulu, Hawaii, January 10, 1996.

/s/ DANIEL G. HEELEY
for Judge Wendell Huddy

EXHIBIT "A"

THE LAW OFFICES OF
JOHN A. CHANIN

JOHN A. CHANIN 650-0
2618 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808)538-1637
Facsimile: (808) 532-1401

Attorney for Pro Per

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff,

vs.

EUGENIE PARNAR,
Defendant.

Civil No. 90-1843-06
(Contract)

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT EUGENIE PARNAR ON MARCH 24, 1995

Date: April 19, 1995
Time: 10:30 a.m.
Judge: Wendell Huddy

[Filed]
[1995 Aug - 8 3:34 PM]
[N. Anaya]
[Clerk]

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT EUGENIE PARNAR ON MARCH 24, 1995

Plaintiff, the Law Offices of John A. Chanin, filed its Motion for an Order for Sanctions Against Defendant Eugenie Parnar on March 24, 1995; the matter came on for hearing on April 19, 1995 before the undersigned Judge of the Circuit Court of the First Circuit; the Court read the submissions of the parties and heard their arguments, and having considered the foregoing as well as the files and records in this case, for Good Cause Appearing, the Court does hereby order, Adjudge and Decree, that the following sanctions shall be and are hereby are imposed against Defendant Eugenie Parnar:

(1) That Defendant Parnar's counter-claim against Plaintiff is hereby dismissed with prejudice;

(2) That Defendant Parnar is hereby held in default as against the claims of Plaintiff, as set out in its Complaint, said Default to be entered forthwith;

DATED: Honolulu, Hawaii, July 31, 1995

/s/ WENDELL H. HUDDY
Judge of the above-entitled court

APPROVED AS TO FORM

[no signature]
EUGENIE PARNAR

EXHIBIT "B"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff,

V.

EUGENIE PARNAR,
Defendant.

Civil No. 90-1843-06
(Contract)

AFFIDAVIT OF JOHN A. CHANIN

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

COMES NOW JOHN A. CHANIN, and under oath deposes and says:

1. That he is an attorney licensed to practice in the State of Hawaii and generally doing business as " The Law Offices of John A. Chanin", Plaintiff herein;

2. That Affiant was the Defendant's attorney in conjunction to this matter;

3. That an Order Granting Plaintiff's Motion for Sanctions Against Defendant Eugenie Parnar filed on March 24, 1995, filed August 8, 1995;

4. That the final invoice received by Defendant Eugenie Parnar was on February 5, 1991;

5. That the principal amount due and owing is $24,431.88;

6. That the pre-judgment interest of $13,437.55 is due and owing;

7. That the attorney's fees is $7,581.46 and costs is $1,895.37 is due and owing;

FURTHER AFFIANT SAYETH NAUGHT.

/s/ JOHN A. CHANIN

Appendix IV
Order of the Circuit Court of the First Circuit
Order Denying Petitioner's Motion to Open and Amend
Judgment Entered January 11, 1996

THE LAW OFFICES OF
JOHN A. CHANIN

JOHN A. CHANIN 650-0
The Executive Centre
1088 Bishop Street
Suite 511
Honolulu, Hawaii 96813
Telephone: (808) 538-1637
Facsimile: (808) 531-5055

Plaintiff Pro Per

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff,

vs.

EUGENIE PARNAR,
Defendant.

Civil No. 90-1843-06
(CONTRACT)

ORDER DENYING DEFENDANT EUGENIE PARNAR'S MOTION TO OPEN AND AMEND JUDGMENT ENTERED JANUARY 11, 1996

Date: January 31, 1996
Time: 10:30 a.m.
Judge: Daniel G. Heely

[Filed]
[1996 May - 24 10:55 AM]
[F.Otake]
[Clerk]

ORDER DENYING DEFENDANT EUGENIE PARNAR'S MOTION TO OPEN AND AMEND JUDGMENT ENTERED JANUARY 11, 1996

Defendant Eugenie Parnar's Motion to Open and Amend the Judgment Entered on January 11, 1996 which was filed on January 17, 1996 and came on for hearing before the Honorable Daniel G. Heely on January 31, 1996; the Court has reviewed the records and files in this matter as well as the submissions of the parties; the Court has also considered the arguments of Defendant Parnar and John A. Chanin of behalf of The Law Offices of John A. Chanin, Plaintiff herein, and based upon the foregoing the Court finds:

1. The Complaint in this matter was filed by Plaintiff on June 18, 1996;

2. Defendant Parnar's deposition, duly noticed by Plaintiff, was commenced on December 4, 1991; the deposition was to be continued at a date mutually agreed

upon by Plaintiff and Defendant through her then counsel Philip D. Bogetto;

3. Since the interruption of Defendant Parnar's deposition on December 4, 1991, Plaintiff has been forced to file numerous motions to compel Defendant Parnar to appear for the continuation and of her deposition, and in spite of the fact that Defendant Parnar has been ordered to appear and allow for the continuation and completion of her deposition, she has refused to do so;

4. That as early as January 1992, Defendant Parnar filed a Motion to have her deposition terminated and as the result of the hearing, she was ordered by Judge Robert Klein, to arrange for the resumption of her deposition; Parnar failed to do so;

5. Defendant then filed a Motion for Summary Judgment and used the pendency of that Motion as an excuse for not going forward with her deposition:

6. After Defendant Parnar's Motion for Summary Judgment and her Request for Leave to File an Interlocutory Appeal were both denied, she still continued to refuse to make herself available for the resumption of her deposition;

7. In September of 1993, Judge Melvin Soong after a hearing on Plaintiff's Motion to Compel, ordered Defendant Parnar to resume her deposition; however, before the Order could be entered, Defendant Parnar filed her objections to the proposed Order and continued to refuse to cooperate in making arrangements for the taking of her deposition;

8. In November of 1993, Plaintiff was again forced to file a Motion to Compel Defendant Parnar to appear for the resumption of the taking of her deposition; Defendant Parnar requested the continuance of the hearing so that she could find new counsel; consequently, the matter did not come on for hearing until March 4, 1994, two (2) years after the deposition was originally begun;

9. At the March 4th hearing before Judge Kevin Chang, attorneys Bogetto and Lila Barbara Kanae appeared; Mr. Bogetto indicated that he was no longer representing Defendant Parnar whereas Ms. Kanai indicated that although she had been retained, she was not as yet counsel on record; Ms. Kanai further indicated that she was not familiar with the file and requested another continuance; Judge Chang refused to allow the matter to be continued any further and consequently, Defendant Parnar shoe to speak on her own behalf;

10. Judge Chang ruled that the deposition was to continue and so as to avoid any further delay, designated a specific date, i.e. March 24, 1994;

11. On March 8, 1995, Ms. Kanai filed a Motion Requesting a Rehearing on the matter which had just been heard by Judge Chang, her reason being that she was now actively involved in the case and there were "many matters" which needed to be looked into: the Motion for a Rehearing was denied;

12. Shortly after the denial of the request for rehearing, Defendant Parnar relieved Ms. Kanai of any further involvement as her attorney; Defendant Parnar notified Plaintiff of this turn of events and further indicated that in

spite of the Order directing her to do so, she would not attend the deposition because she did not have an attorney;

13. The case was set for trial during the week of September 12, 1994; as of the time of the setting, Defendant Parnar had still failed to appear for the resumption of her deposition, and she continued to refuse to appear based upon the fact that she still had not retained counsel;

14. In August of 1994, Defendant Parnar moved to have the matter taken off the trial calendar in that she was still without counsel; Judge Herbert Shimabukuro, indicating his concern about the problems that often occur in cases of self-representation took the matter off of the trial calendar so that Defendant Parnar could find counsel;

15. At a subsequent trial setting before Judge Wendell Huddy, Defendant Parnar again protested that she was not prepared to go to trial in that she still had not been able to obtain counsel; her protest notwithstanding Judge Huddy set the case for trial during the week of December 18, 1995;

16. Shortly after the trial setting conference, Plaintiff again noticed Defendant Parnar's deposition and requested that she turn over various documents regarding her defenses and her counter-claim; Defendant Parnar immediately filed a Motion for a Protective Order, indicating that she did not have an attorney and did not believe that she should be "subjected" to Plaintiffs questioning without the "protection" of counsel;

17. Defendant's Motion for a Protective Order was heard on February 2, 1995 and was denied by Judge Huddy; at the time of the hearing, Judge Huddy also Ordered

Defendant Parnar to deliver the documents requested by Plaintiff at his office no later than March 3, 1995 and further Ordered Defendant Parnar to appear at Plaintiff's office for the resumption of her deposition at 9:00 a.m. on March 22, 1995;

18. In response to this latest Order by Judge Huddy directing Defendant to resume her deposition, she filed still another Motion for rehearing indicating that she still was without counsel; this Motion was also denied;

19. On March 3, 1995, Defendant Parnar and an "escort" appeared at Plaintiff's office and delivered her responses to Plaintiff's request for documents; her responses were evasive, inadequate and incomplete;

20. Less that 24 hours before her deposition was to be taken, Defendant Parnar's "escort" again appeared at Plaintiff's office with a letter from Defendant in which she indicated that she would not attend the resumption of her deposition, citing all of the reasons which she had raised in the past including the fact that she still was unable to retain counsel;

21. Based upon Defendant's continuing refusal to comply with the Orders of Court, Plaintiff filed a Motion for Sanctions on March 24, 1995; the matter was heard by Judge Huddy on April 19, 1995;

22. On August 8, 1995, the Order granting the requested sanctions was signed by Judge Huddy and filed;

23. Subsequently, on January 11, 1996, the Judgment which Defendant in her present Motion requests be opened and amended, was filed;

Based upon the foregoing, for GOOD CAUSE APPEARING, it is hereby ORDERED, ADJUDGED and DECREED that Defendant Parnar's Motion to Open and Amend the Judgment Entered on January 11, 1996 is hereby DENIED.

DATED: Honolulu, Hawaii, May 24, 1996.

/s/ DANIEL G. HEELY
JUDGE OF THE ABOVE-
ENTITLTED COURT

APPROVED AS TO FORM:

[Unsigned]
EUGINIE PARNAR

Appendix V
Order of the Circuit Court of the First Circuit
Granting Plaintiff's [Respondent] Motion for Sanctions

THE LAW OFFICES OF
JOHN A. CHANIN

JOHN A. CHANIN 650-0
1001 Bishop Street
2618 Pauahi Tower
Honolulu, Hawaii 96813
Telephone: (808)538-1637
Facsimile: (808) 532-1401
Attorney Pro Per

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff,

vs.

EUGENIE PARNAR,
Defendant.

Civil No. 90-1843-06
(Contract)

[Filed]
[1995 Aug - 8 3:34 PM]
[N. Anaya]

[Clerk]

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT EUGENIE PARNAR ON MARCH 24, 1995

Plaintiff, the Law Offices of John A. Chanin, filed its Motion for an Order for Sanctions Against Defendant Eugenie Parnar on March 24, 1995; the matter came on for hearing on April 19, 1995 before the undersigned Judge of the Circuit Court of the First Circuit; the Court read the submissions of the parties and heard their arguments, and having considered the foregoing as well as the files and records in this case, for Good Cause Appearing, the Court does hereby order, Adjudge and Decree, that the following sanctions shall be and are hereby are imposed against Defendant Eugenie Parnar:

(1) That Defendant Parnar's counter-claim against Plaintiff is hereby dismissed with prejudice;

(2) That Defendant Parnar is hereby held in default as against the claims of Plaintiff, as set out in its Complaint, said Default to be entered forthwith;

DATED: Honolulu, Hawaii, July 31, 1995

/s/ WENDELL H. HUDDY

APPROVED AS TO FORM

[no signature]
EUGENIE PARNAR

Appendix VI
Supreme Court Order
Allowing Resignation in Lieu of Discipline

NO. 21407

IN THE SUPREME COURT OF
THE STATE OF Hawaii

OFFICE OF DISCIPLINARY COUNSEL,
Petitioner,

vs.

JOHN A. CHANIN,
Respondent.

ODC NO. 97-280-5474

[Filed]
[1998 Mar - 19 1:37 PM]
[K. Miyahara]
[Clerk Supreme Court]

ORDER ALLOWING RESIGNATION
IN LIEU OF DISCIPLINE

Upon consideration of Petitioner Office of Disciplinary Counsel's "Ex Parte Motion For Order Granting Request of John A. Chanin To Resign From the Practice of Law in Lieu

of Discipline," and the memorandum, affidavit, and exhibit in suport thereof, it appears the motion is supported by Respondent Chanin's affidavit and that the affidavit meets the requirements of Rule 2.14(a) of the Rules of the Supreme Court of the State of Hawaii. Therefore,

IT IS HEREBY ORDERED that the motion is granted and the request of Respondent John M. Chanin to resign in lieu of discipline is granted, effective upon the filing of this order.

IT IS FURTHER ORDERED that (l) the Clerk shall immediately remove the name of Respondent John A. Chanin from the roll of attorneys licensed to practice law in this jurisdiction and (2) within ten (l0) days after entry of this order. Respondent John A. Chanin shall deposit with the Clerk of this Court the original certificate evidencing his license to practice law in this jurisdiction.

IT IS FINALLY ORDERED that (l) Respondent John A. Chanin shall comply with the requirements of Rule 2.l6 of the Rules of the Supreme Court of the State of Hawaii and (2) the Disciplinary Board shall provide notice to the public and judges as required by rule 2.16 of the Rules of the Supreme Court of the State of Hawaii.

DATED: Honolulu, Hawaii, March 19, 1998.

/s/ Ronald T.Y. Moon
/s/ Robert G. Klein
/s/ Steven H. Levinson
/s/ Paula A. Nakayama
/s/ Mario R. Ramil

Appendix VII
Order of the Supreme Court,
Prohibiting Clerk from Accepting Further Filings

No. 19946

IN THE SUPREME COURT OF
THE STATE OF Hawaii

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff-Appellee,

vs.

EUGENIE PARNAR,
Defendant-Appellant.

EUGENIE PARNAR,
Counterclaimant and Appellant,

vs.

THE LAW OFFICES OF
JOHN A. CHANIN,
Counterclaim-Defendant and Appellee.

Civil No. 90-1843
[Filed]
[1998 Apr - 8 1:59 PM]
[L. Nakagawa]
[Clerk Supreme Court]

ORDER

Upon consideration of (l) Appellant's "emergency motion for stay of enforcement of final judgment on appeal pending obtaining of records regarding... [a disciplinary case]" (motion) and (2) the record, it appears this appeal was decided by summary disposition order on January 21, 1998, the notice and judgment on appeal was entered on February 17, 1998, and this case is closed. Therefore,

IT IS HEREBY ORDERED that the motion is stricken.

IT IS FURTHER ORDERED that the Clerk shall accept no further filings in this appeal.

DATED: Honolulu, Hawaii, April 8, 1998.

/s/ Mario R. Ramil
Associate Justice

Appendix VIII
Supreme Court, State of Hawaii
Office of Disciplinary Counsel
Notice Concerning Attorney John A. Chanin

NOTICE CONCERNING ATTORNEY
JOHN A. CHANIN

MEMO TO: All State and Federal Judges in Hawaii

FROM: Michael T. Lee /s/ Michael T. Lee
Assistant Disciplinary Counsel

DATE: March 20, 1998

SUBJECT: Order Granting Request to Resign in Lieu of Discipline

In accordance with RSCH 2.16(f), we enclose a certified copy of an order of the Supreme Court of Hawaii allowing Honolulu attorney John A. Chanin to resign in lieu of discipline, effective March 19, 1998.

Administrative Judges are asked to take such action as is deemed necessary to protect the rights of any clients of Mr. Chanin whose cases may be pending in court.

If there are any questions, please telephone me at 521-4591.

MTL:jv
enclosure

Appendix IX
Petitioner's Opening Brief

No. 19946

IN THE SUPREME COURT OF
THE STATE OF Hawaii

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff-Appellee,

vs.

EUGENIE PARNAR,
Defendant-Appellant.

EUGENIE PARNAR,
Counterclaimant and Appellant,

vs.

THE LAW OFFICES OF
JOHN A. CHANIN,
Counterclaim-defendant and Appellee.

Civil No. 90-1843

APPEAL FROM

1) THE JUDGMENT FILED ON JANUARY 11, 1996,
AND

2) THE ORDER DENYING DEFENDANT EUGENIE PARNAR'S MOTION TO OPEN AND AMEND JUDGMENT ENTERED JANUARY 11, 1996, FILED MAY 24, 1996.

FIRST CIRCUIT COURT

HON. Robert G. Klein
HON. Francis Q. F. Wong
HON. Russell Nnagata
HON. Barry Kurren
HON. Thomas Kaulukukui, Jr.
HON. Virginia L. Crandall
HON. Kevin S. C. Chang
HON. Wilfred K. Watanabe
HON. Colleen K. Hirai
HON. Herbert Shimabukuro
HON. Wendell K. Huddy
HON. Karen N. Blondin
HON. Gail C. Nakatani
HON. Danial G. Heely
Judges

[Filed]
[1997 Apr - 22 3:09 PM]
[Eugene L. Sabado]
[Clerk Supreme Court]

APPELLANT'S OPENING BRIEF
APPENDICES A-D
and
CERTIFICATE OF SERVICE

PETER VAN NAME ESSER 3515
Suite 400, Seven Waterfront Plaza
500 Ala Moana Boulevard
Honolulu, HI 96813
Telephone: (808) 538-3636

Attorney for Defendant-Appellant and Counterclaimant
EUGENIE PARNAR

I. STATEMENT OF THE CASE.

A. The Underlying Lawsuits.

On June 18, 1990, Plaintiff-Appellee and Crossclaim Defendant JOHN A. CHANIN ("Chanin") filed a complaint for attorney's fees against Defendant-Appellant and Counterclaimant EUGENIE PARNAR ("Parnar") in First Circuit Court. Record on Appeal, Volume I ("RA-I") at 1. On July 9, 1991, Parnar filed an answer and counterclaim against Chanin charging him with breach of his fee agreement, false billings and legal malpractice. RA-I at 103.

Chanin claimed Parnar owed him a balance of $24,431.88 (after taking $45,545.68 from her trust account) for services performed when he represented her in a fee dispute with predecessor counsel in *Parnar v. Americana Hotels*, Civil No. 52878, where Parnar obtained damages from Americana for unlawful termination. RA-I at 1. Parnar hired Chanin after this Court affirmed her award against Americana in *Americana Hotels*. RA-I at 186. Parnar hired Chanin to 1) defend against Americana's petition for certiorari in the U. S. Supreme Court, 2) defend against a fee claim by predecessor counsel David Schutter, and 3) defend against a fee claim by predecessor counsel Michael Lilly. *Id.*

Chanin did not perform as promised. *Id.* He was not a member of the U. S. Supreme Court bar. *Id.* He settled with Schutter. *Id.* He lost the challenge to Lilly's fees. *Id.* He assigned an inexperienced associate to the Lilly dispute, resulting in defeat and a near default of Parnar's appeal. *Id.* He increased his hourly rate without notice, and submitted false, inflated billings, including one entry for 55 hours by one attorney on one day. *Id.*

B. Parnar's December 4, 1991, Deposition.

The parties agreed on a December 4, 1991, deposition date at Chanin's office. RA-I at 131-135. Bogetto and Parnar cleared their calendars for two days. *Id.* Chanin's office called Bogetto three times to inquire as to Parnar's appearance. *Id.* Nothing was said about scheduling conflicts or Chanin's plans to leave Honolulu on the day of the scheduled deposition. *Id.* Bogetto and Parnar appeared at Chanin's offices at 9:00 AM on December 4, 1991. *Id.*

Chanin conducted the deposition in his office--rather than his conference room--from a chair placing him above Bogetto and Parnar, seated on a two-seat couch. *Id.* at 132, 136. His interrogation was insulting, intimidating and, according to then-First Circuit Judge Robert G. Klein, entirely irrelevant. RA-I at 131, 139.

Chanin questioned Parnar about 1) the number of lawsuits she had filed in her life, 2) the number of depositions she had taken, 2) her marital history, 3) her education, 4) her residential history, 5) her employment history, 6) her work hours in all her jobs, 7) why and when she left each job, 8) the names of her superiors, and 9) why she sued Americana Hotels. RA-I at 139-171.

When Parnar could not recall dates or names, or asked to speak to Bogetto, Chanin refused, asking questions like, "why don't you answer my question first?" "is that your testimony?" "is that an answer?" "what do you mean?" "you're sure now?" "you don't have any recollection whatsoever as to when you worked there?" "you don't recall what?" "now will you answer the question?" "you can't be any more accurate than that?" "so you don't have any recollection whatsoever?" "what about the question do you not understand?" and "is it really your testimony under oath that you can't recall?" RA-I at 143, 150-152, 155-156, 160, 163-164, 168.

Chanin also made unnecessary and belligerent comments like, "I don't want to get bogged down," "you lost me," "I just did," "the fact of the matter is," "just answer that question," "if you were in court on the stand and I asked you the question you'd have to answer it," and "I must tell you that I've asked that question to people over the last 20 some odd years and this is the first time I've had that kind of response." *Id.* at 145, 153, 155, 159, 160. Bogetto objected repeatedly to irrelevant questions:

> I'm going to object on the grounds of relevance. What she was doing back in 1975 at the Ala Moana Hotel has nothing to do with this lawsuit.

RA-I at 154, *see also*, *Id.* at 155 ("irrelevant") and *Id.* at 157 ("I object as to relevancy"). Chanin ignored Bogetto's objections. When Parnar testified that she worked for the Hawaii Crime Commission for three years in the 1970's, Chanin inquired:

> What did the program substantially consist of? Was it about the birds and the bees? Was it about crime? Was it about drugs? Was it about geography?

RA-I at 167-168. Chanin asked *no questions* about 1) Chanin's services as her attorney, 2) Parnar's alleged outstanding legal bills, 3) Chanin's malpractice, or 4) anything whatsoever about the allegations in the complaint or counterclaim. *Id.*

After asking irrelevant, obnoxious questions for 60 minutes, Chanin abruptly stopped the deposition. *Id.* at 168. At 10:46 AM Chanin told Parnar and Bogetto he "had to leave at 11:30 AM to go to the airport to catch a flight to the mainland." RA-I at 134. "[W]e are stopping now and then picking up again at our offices on January 6, 1992," Chanin said. RA-I at 169. "We had anticipated we would be here all day," Bogetto noted for the deposition record, "I understand that you did not anticipate it would take that long and therefore have plans to leave town today." *Id.*

C. Parnar's Motion to Terminate; Judge Klein.

On January 3, 1992, Parnar filed a motion to terminate her deposition, "on the ground that such examination is being conducted in bad faith and in such manner as unreasonably to annoy, embarrass or oppress defendant." RA-I at 131. Chanin "had no serious intent of taking a deposition on December 4, 1991, for discovery purposes," claimed Parnar, "he asked questions irrelevant to the lawsuit for which the deposition was called." *Id.* at 135. "Chanin's voice intonations were sarcastic and his demeanor imperious and intimidating." *Id.* at 137. Parnar noted:

> I have had my deposition taken on four prior occasions and never had to endure the abuse of dignity that Mr. Chanin tried to display toward me.

RA-I at 137. Parnar attached a copy of the December 4, 1991, deposition transcript to her motion to terminate. *Id.* at 139.

Chanin filed opposition papers falsely stating, "counsel failed to raise an objection as to relevance during the deposition[.]" RA-I at 197. Chanin insisted his questions were "well within the liberal scope of discovery[.]" *Id.* at 196.

The parties appeared before First Circuit Judge Robert Klein on March 3, 1992. "I certainly couldn't see where the questions were going," commented Judge Klein after reviewing the transcript:

> I was trying to think of where in the pleadings--*having looked at the counterclaims, the defenses, the affirmative defenses and the case in chief*, what this related to.

3/3/92 Tr. at 3 (emphasis added). "What difference does it make," he asked, "whether she was a part-time waiter?" *Id.* "You're trying to collect attorney's fees from this woman," said Judge Klein, "what's the difference where she worked 20 years ago?" *Id.*

When Chanin complained that Parnar was nonresponsive during the deposition, Judge Klein said, "it falls under the rubric of ask a silly question." *Id.* at 4. "[Y]ou were just asking basically a lot of irrelevant questions," he said, "[i]t is

a waste of time[.]" *Id.* at 5. "[I]t's basically a collection case, Mr. Chanin." *Id.* at 7. "35 pages to establish nothing relevant," observed Judge Klein again, "is a total waste of time." *Id.*

Judge Klein declined Parnar's request to terminate the deposition, but told Chanin, "get to the point[.]" *Id.* at 8. "I don't want to see you back here again." *Id.* As the prevailing party, Chanin was charged with preparing the written order.

No such order was ever prepared by Chanin. RA-II at 32. Displeased with the court's ruling, Chanin ignored the issue of relevancy and dispatched notices setting depositions for April 23, May 12, and June 9, 1992. *Id.* Citing *HRCP* Rule 30(d) and *HCCR* Rule 23, Bogetto wrote Chanin and said he would not attend a deposition until Chanin filed a proposed order denying Parnar's motion to terminate accompanied by relevancy limitations imposed by Judge Klein at the March 3, 1992, hearing. RA-II at 32-33.

D. Chanin's Motion to Compel; Judge Kaulukukui.

On July 8, 1992, Chanin filed a motion to compel Parnar to appear at her deposition. RA-I at 254. His papers contained serious misstatements of fact. "[O]n or about December 4, 1991, Plaintiff began [his] deposition of Defendant in the above entitled matter." *Id.* at 258. "During said deposition," wrote Chanin, "Defendant refused to answer relevant questions put to her and terminated the deposition without allowing Plaintiff to complete his questioning." *Id.* "Plaintiff has terminated one deposition during Defendant's questioning," claimed Chanin. *Id.* at 256. "Defendant moved for a protective order after unilaterally terminating her deposition." *Id.* at 258.

These allegations contained three basic fabrications.

First, at the March 3, 1992, hearing on Parnar's motion to terminate, Judge Klein found Chanin's questions *irrelevant*. "[Y]ou were just asking basically a lot of irrelevant questions," said the court, "nothing relevant." 3/3/92 Tr. at 5, 7. Chanin never submitted a proposed order to Judge Klein, and no transcript of the hearing was prepared until this appeal. In his July 8, 1992, moving papers Chanin claimed Parnar filed a motion "for protective order" and declared, "[t]his court denied Defendant's motion and instructed that Plaintiff complete its deposition of Defendant with due sensitivity to Defendant." RA-I at 258. This statement flatly mischaracterized Judge Klein's March 3, 1992, oral ruling[1].

Second, Parnar *answered every question* put to her by Chanin, even those objected to as irrelevant. *See* RA-I at 139-171. Chanin's statement otherwise misstated the deposition record.

Third, Chanin's claim that Parnar "terminated" the December 4, 1991, deposition was a lie, since it was he who abruptly cancelled because of a plane flight kept secret from Bogetto and Parnar. *Id.* at 170; *see also*, RA-II at 32.

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[1] Chanin repeatedly characterized Parnar's objections as focused on the height of his chair. Hence his suggestion that Judge Klein directed him to honor her "sensitivity." By ignoring her objections to relevancy, and his unilateral termination of the December 4, 1991, deposition, Chanin skillfully belittled his opponent's position and distorted Judge Klein's 1992 oral ruling.

Because of a pending criminal trial, Bogetto filed no response and sent a friend to ask for a continuance at the July 21, 1992, hearing before First Circuit Judge Thomas K. Kaulukukui on Chanin's motion. 7/21/92 Tr. at 2. In Bogetto's absence Chanin lied:

> All I want to do your honor is get a date certain set to take this lady's deposition and to get sanctions *because we have been here so often trying to get Ms. Parnar to show up[.]*

7/21/92 at 3 (emphasis added). First, Chanin had already taken Parnar's deposition, which he terminated, and which Judge Klein characterized as "35 pages to establish nothing relevant[.]" 3/3/92 Tr. at 7. Second, this was Chanin's *first motion to compel*, and telling Judge Kaulukukui he had "been here so often trying to get Ms. Parnar to show up" was a lie. 7/21/92 Tr. at 3.

The court granted Bogetto's motion to continue and took the matter off calendar. *Id.* at 7. Chanin never renewed his motion and Judge Kaulukukui never ruled. *Id.* Instead, Chanin dispatched further notices setting dates for Parnar's continued deposition. RA-II at 5. Bogetto wrote back declining to appear unless Chanin filed a proposed order summarizing Judge Klein's ruling. RA-II at 32, 40. Chanin's papers before Judge Kaulukukui, noted Bogetto, made clear he would not abide by Judge Klein's rulings. *Id*[2].

---

[2] In his written opposition to Chanin's second motion to compel Bogetto observed, "[t]he written order of Judge Klein is necessary in order to clearly define the parameters of Plaintiff's deposition tactics[.]" RA-II at 35.

E. Chanin's Motion to Compel: Judge Nagata.

On August 25, 1993, Chanin filed a second motion to compel. RA-II at 19. It was as full of lies as his first. *Id.* Chanin claimed Parnar "used every available excuse to avoid having her deposition taken." *Id.* at 22. He ignored Judge Klein's relevancy rulings. *Id.* He claimed his opponent "refused to answer relevant questions" at the 1991 deposition and "terminated the deposition without allowing Plaintiff to complete [his] questions." *Id.* at 24. He claimed Bogetto "readily admitted that Defendant has no intention whatsoever of having her deposition taken and will do everything possible to avoid being deposed," which was a lie. *Id.* at 23, 40. He claimed Bogetto "agreed to deposition dates" and then cancelled them, which was also a lie. *Id.* at 8, 22-23, 40.

Chanin claimed Judge Kaulukukui--who heard Chanin's first motion to compel--was "upset not only with the obvious stalling tactics," but "indicated his great displeasure with Mr. Bogetto" for failing to attend the July 21, 1992, hearing. *Id.* at 23. In fact, Bogetto sent substitute counsel and Judge Kaulukukui freely granted his request for a continuance because "he is presently in district court in that he is conducting a trial." 7/21/92 Tr. at 2. "I understand the schedule of Mr. Bogetto," declared Judge Kaulukukui, "I am going to grant a continuance and have this matter taken off calendar[.]" *Id.* at 5.

On September 24, 1993, Chanin and Bogetto appeared before First Circuit Judge Russel Nagata. Chanin's oral presentation contained more lies. "Judge Kaulukukui pretty much had reached the point of a limit of his patience," Chanin lied. 9/24/93 Tr. at 2. "[E]ither take the deposition

or I [will] have this matter heard," Judge Kaulukukui supposedly told the absent Bogetto, "I'm getting tired of all this." *Id.* Judge Kaulukukui said no such thing. *See* 7/21/92 Tr. 1-14. Chanin got away with lies about Judge Kaulukukui because neither Bogetto nor Judge Nagata were at the prior hearing.

Chanin lied about Parnar's objections, claiming they were based on chair height. *Id.* at 3. He lied about Judge Klein's rulings, suggesting he ruled Chanin's questions irrelevant without considering the counterclaim for malpractice. *Id.* at 3, 10[3].

Chanin lied about Judge Klein's order. *Id.* at 3. "An order ultimately got filed," Chanin lied, "it's the issue that has been raised every single time[.]" *Id.* Judge Nagata asked Chanin to produce the order. *Id.* "I don't have it in this particular file," Chanin replied, "the other files go back quite a ways." *Id.* at 4. "Mr. Bogetto filed the order," Chanin lied, "[h]e took it upon himself to file it." *Id.* "It's never been an issue," Chanin lied, "and no one has ever legitimately raised it as a issue." *Id.*

Chanin attacked Bogetto. *Id.* Bogetto would agree to a deposition date, Chanin lied, and "the night before I would receive a letter saying, oh, he can't make it." *Id.* Bogetto would demand a copy of Judge Klein's order, said Chanin, and "[t]he issue has long since been resolved for two years[.]" *Id.* at 5.

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[3] The counterclaim was filed by Parnar four months before the December 4, 1991, deposition, and Judge Klein expressly referred to it before ruling on March 3, 1992, that Chanin's deposition questioning was, "a complete waste of time." See 3/2/92 Tr. at 3 ("having looked at the counterclaims[.]")

Bogetto told Judge Nagata that no such order had been filed. *Id.* at 7. "[W]e did have a hearing," said Bogetto, "and Judge Klein did issue a ruling, and as far as I'm aware there has been no order entered on that motion to terminate." *Id.* Bogetto said:

> My client would like to have that order entered setting the parameters of a continued deposition of her to be taken by Mr. Chanin. . . . I would like to have that order entered before we go because we're going to get into an argument about whether or not he's going too far.

9/24/93 Tr. at 7. Judge Klein, said Bogetto, "looked at the transcript of the previous deposition and thought that a lot of the questions were irrelevant[.]" *Id.* at 8. "All I'm asking the court," pleaded Bogetto, "is say, look, submit that order, get it signed and filed, and then schedule the deposition[.]" *Id.* at 8.

"I'm going to enter an order compelling the deposition," ruled Judge Nagata. *Id.* at 12. "[C]ertain things weren't filed," said Nagata, "so I'm not going to award any sanctions." *Id.* Judge Nagata ordered Chanin to prepare an order setting a deposition date for Parnar on October 13, 14, or 15, 1993. *Id.* at 13.

Chanin did not notice an October 1993 deposition. The court signed and filed an order prepared by Chanin (ordering a deposition on October 13, 14 or 15, 1996) on October 26, 1993. RA-II at 61. Chanin noticed a new deposition on November 10, 1993. RA-II at 63. Bogetto wrote Chanin declining to appear because 1) Chanin had not filed a order

for Judge Klein, and 2) the October 26, 1993, order entered by Judge Nagata was void on its face. RA-II at 80, 83.

F. Chanin's Motion for Sanctions; Judge Chang.

On November 18, 1993, Chanin filed a motion for sanctions for Parnar's failure to appear on November 10, 1993. RA-II at 66. Bogetto is "raising the exact same issues that he had raised many times before," lied Chanin, "uniformly denied by every judge previously hearing them." *Id.* at 73. In fact, no prior judge rejected Parnar's claims, and Judge Klein upheld her relevancy objections. No judge had reviewed Judge Nagata's order, since Judge Nagata was the first judge to rule on a motion to compel. On March 4, 1994, Chanin's motion for sanctions was heard before First Circuit Judge Kevin Chang. 3/4/94 Tr. at 1. Bogetto filed papers in opposition but did not appear, having withdrawn in favor of attorney Lila Kanae. *Id.* Kanae did her best to refute Chanin's distortions of prior proceedings. *Id.* She told Judge Chang that Chanin had not given Parnar her files from *Americana Hotels*, so she could not prepare for a deposition on his fees or malpractice, or for trial. RA-II at 138. "[T]he files maintained by Bogetto," Kanae told Judge Chang, "are by no means sufficient for counsel to properly prepare for a deposition of Defendant[.]" *Id*[4].

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[4] Kanae wrote Chanin three times requesting Parnar's *Americana Hotels* files without success. RA-II at 138. Unable to obtain files, and lacking the records to defend Parnar at a deposition or trial, Kanae withdrew two months later. RA-II at 145-149.

After Kanae withdrew, Parnar wrote letters pro se to Chanin requesting her files, with similar results. RA-III at 171-172. It is a breach of professional ethics for an attorney to withold client files. *See*

(continued...)

"I don't want to take her deposition," said Chanin, "I think it's time just to dismiss her counterclaim." 3/25/94 Tr. at 5. That claim "makes all kinds of irresponsible allegations about me," Chanin lied. *Id*[5]. "This is about her fifth lawyer in this matter," Chanin lied again, "[n]ow we have still another[.]" *Id*[6]. "I have been put to the test before virtually every judge on the circuit court level," Chanin lied still again, "to get some kind of accommodation." *Id.* at 6[7]. Chanin asked for sanctions against the absent Bogetto as well. *Id.* Bogetto's objections to the November 10, 1993, deposition were "nonsense," lied Chanin, and based on "psychological harassment." *Id* at 6. Chanin told Judge Chang, with no evidence whatsoever, that Parnar's lawyers are:

---

[4](...continued)
Office of Disciplinary Counsel v. Kagawa, 63 Haw. 150, 622 P.2d 115 (1981). Parnar's inability to obtain files from Chanin made it difficult for her to find new counsel and impossible to prepare for Chanin's deposition. *Id.*

[5] Parnar's counter-claim merely claimed Chanin overcharged her, assigned an inexperienced associate to her case, "and negligently provided legal services . . . resulting in substantial economic loss." RA-I at 103, 106.

[6] Lila Kanae was Parnar's second, and final, lawyer, after Philip Bogetto, in Civil 90-1843-06. *See e.g.*, RA-I at 58.

[7] Chanin's first motion to compel was heard by Judge Kaulukukui in Bogetto's absence. 7/21/92 Tr. at 1. When Judge Kaulukukui took it off calendar, Chanin did not seek a second hearing date. *Id.* There were no orders and no sanctions. *Id.* Judge Nagata heard Chanin's second motion to compel. Because of Chanin's negligence, Judge Nagata filed a void order. Judge Nagata did not impose sanctions. There are 22 circuit court judges in Honolulu.

> being led around by a woman who is going to continue, quite frankly, to use the threat of litigation against them to make them do her bidding.

3/4/94 Tr. at 15. This statement was a lie.

Parnar's new lawyer, Lila Kanae, argued:

> [Chanin] willfully refused to follow Rule 23 . . . which requires submission of a proposed written order within ten days of the oral ruling. Here he didn't want to file a written order because Judge Klein's order was adverse to him. It limited the manner and scope of how the deposition would be taken. So what did he do? He chose to ignore it.

3/4/94 Tr. at 8. Chanin, argued Kanae, requested sanctions under *HRCP* Rule 37(b) without showing Parnar's refusal to attend a court-ordered deposition. *Id.* Judge Nagata's order "requires a deposition be had on a date which has already lapsed." *Id.* at 9. Kanae said she had received no files and could not prepare her client for a deposition or trial if she had no files. *Id.*

Chanin lied in rebuttal. *Id.* at 14. "Judge Nagata said no more history Mr. Bogetto." *Id.* "Judge Kaulukukui said I don't want to hear any more of this." *Id.* The transcripts of those hearings contradict these claims. *See* 7/21/92 Tr. at 1-10;

Chanin's mendacity failed to elicit sanctions. 3/4/94 Tr. at 18. But Judge Chang ordered Parnar to attend a deposition on March 25, 1994, although Chanin had not filed a motion to compel. *Id.* "Mr. Chanin," said the court, "will you

prepare the order?" *Id.* "Yes, I will," said Chanin. *Id.* at 19. Chanin did not prepare a proposed order and it was never filed. 9/7/94 Tr. at 4-5. Further, Chanin did not notice a March 25, 1994, deposition. *Id.*

On March 8, 1994, Parnar filed a motion for rehearing, asking, that Judge Chang order Chanin to produce files. RA-II at 135. On May 5, 1994, Parnar's motion was denied. RA-III at 16. The order did not compel Parnar to attend a deposition or direct Chanin to give Parnar her files. *Id.* Without files, and unable to prepare for a deposition or trial, Kanae withdrew. RA-II at 145.

Parnar now had two major problems. She had no lawyer and she had no files. RA-III at 120, 190, 199. On August 23, 1994, she filed a motion to continue the September 1994 trial date. RA-III at 182. The motion was argued before First Circuit Judge Herbert Shimabukuro. 9/7/94 Tr. at 1. Chanin objected but the court granted the motion. *Id.* at 12. Parnar "has made some effort to obtain counsel," said Judge Shimabukuro, "[b]y the nature of this case maybe some attorneys are avoiding it." *Id.* at 12-13.

G. Parnar's Motion for Protective Order; Judge Huddy.

Chanin sent no notices of deposition to Parnar between April 1994 and January 1995, when he finally dispatched a notice with a subpoena seeking documents. RA-III at 203, 205. Parnar had been without counsel for eight months, despite contacting 70 lawyers. 2/2/95 Tr. at 5-6. She had no files. *Id.* Parnar filed a motion for protective order before the deposition claiming 1) Chanin had not provided fair notice, 2) Parnar had no counsel or files, and 3) the subpoena did not comply with court rules. RA-III at 221.

Parnar's motion was heard before First Circuit Judge Wendell K. Huddy on February 2, 1995. 2/2/95 Tr. at 1. Chanin appeared and repeated his lies. *Id.* at 6-9. "[S]he has done a better job of avoidance," he said, "than any attorney I have ever met." *Id.* at 8. Chanin had not yet checked his warehouse for Parnar's files. *Id.* at 9. He said she refused to be deposed because his chair was higher. *Id.* He ignored his termination of the 1991 deposition, misstated Judge Klein's relevancy ruling[8], and omitted his failure to prepare timely orders for Judges Nagata and Chang. *Id.*

Chanin also placed false words in "the last judge's" mouth. *Id.* at 10. "Enough Miss Parnar," this judge supposedly told her, "I don't care whether you have an attorney or not." *Id.* "Your deposition is going to be taken." *Id.* Chanin did not say when he heard these words and no transcript of any hearing contains them. And none could, because Judge Huddy was the first judge to hear a discovery motion by Chanin after Parnar became pro se.

Judge Huddy asked Parnar about getting a lawyer. *Id.* at 13. "I've had a difficult time," she said, "I've been told my case is famous." *Id.* One lawyer told her, she said, "I bet you won't get anyone on this island[.]" *Id.* "I need counsel," said Parnar, "before I can go into a deposition." *Id.* "I need my files." *Id.*

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[8] "Judge Klein was under the mistaken impression," Chanin lied to Judge Huddy, "that it was merely a collection action" when he found the questions "irrelevant" in 1992. 2/2/95 Tr. at 11. "[I]t is well beyond that at this juncture," Chanin told Huddy, "because she has raised these counterclaims claiming malpractice." *Id.* As noted in footnote 3, *supra*, this statement was a lie.

Huddy "grant[ed] the motion in part and den[ied] the motion in part." *Id.* at 14. He continued the deposition date because of Chanin's short notice, but ordered Parnar to produce documents on March 3, 1995, and attend a deposition on March 22, 1995, with or without counsel. *Id.* at 15. Judge Huddy did not sanction Parnar, or threaten her with future sanctions if she failed to comply. *Id.*

H. Chanin's Motion for Sanctions; Judge Huddy.

On February 24, 1995, Parnar moved for rehearing, saying she did not have time to find counsel or obtain Chanin's files. RA-II at 246. Judge Huddy's order setting a deposition in thirty days would have a "chilling effect," she said, "on Defendant's ability to find counsel because an attorney would be reluctant to take on a complex case such as this without adequate time[.]" *Id.* at 251.

Parnar delivered documents on March 3, 1995, which were few because Chanin still had her *Americana* files. RA-II at 161. March 22, 1995, went by without 1) a deposition, 2) a ruling on the motion for rehearing, 3) Chanin looking for files, or 4) an order directing her deposition appearance. *Id.* On May 1, 1995, Judge Huddy denied Parnar's motion for rehearing. RA-II at 325.

On March 21, 1995, Parnar wrote Chanin telling him she could not attend a March 22, 1995, deposition, because 1) no order had been signed, 2) she had no lawyer, 3) she had no files, and 4) she wished to seek review of Judge Huddy's order--when filed--because it had directed her to attend a deposition by an abusive lawyer without counsel or files. RA-II at 295-300.

On March 24, 1995, Chanin filed a motion for order imposing sanctions under *HRCP* "Rule 37." RA-II at 228. He did not specify what sanctions or what subsection of Rule 37 applied:

> Defendant has been ordered to appear for her deposition by numerous judges (including Judges Klein, Soong, Watanabe, Huddy, Chang and Kaulukukui).

RA-II at 231. This statement misled the court. Judges Soong and Watanabe never heard any discovery motions in this case[9]. Judge Klein ruled Chanin's December 4, 1991, deposition questions were irrelevant and denied the motion to terminate, but filed no order. Judge Kaulukukui continued a motion to compel, never ruled, and filed no order. Judges Chang and Huddy asked Parnar to attend a deposition, but filed no orders. When Chanin moved for sanctions under *HRCP* Rule 37 on March 24, 1995, Parnar had *never* declined to attend a deposition compelled by a written order.

Parnar filed pro se opposition papers. RA-II at 301. She said she'd contacted over 70 lawyers seeking representation in this case. *Id.* She'd placed adds in the *Honolulu Advertiser*, the *Star Bulletin* and the *Hawaii State Bar Journal*, and supplied a copy. *Id.* "Defendant is not

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[9] At a March 30, 1994, hearing on Lila Kanae's motion to withdraw as Parnar's counsel, Chanin told First Circuit Judge Wilfred Watanabe that Judge Chang had ordered Parnar to attend a deposition. 3/30/94 Tr. at 3. Judge Watanabe, at the only hearing he sat on in this case, told Chanin, "[y]ou can take that up with Judge Chang." Id. Chanin's claim that Judge Watanabe ordered Parnar to attend a deposition was a lie. RA-II at 231.

disregarding the system," she wrote to Judge Huddy, "the system is disregarding her." *Id.*

On April 19, 1995, Judge Huddy conducted a hearing on Chanin's motion. Parnar told the court she could not attend a deposition with Chanin without counsel or files. 4/19/95 Tr. at 2.

Chanin reiterated his prior distortions. *Id.* "The arguments that are being raised now," said Chanin, "have been raised since December 1991." *Id.* at 5. Chanin did not explain how this could occur when Parnar had been without counsel only since April 1994. *Id.* Although his motion did not specify a sanction, Chanin asked Judge Huddy to "dismiss her counter-claim and default her as to the defenses that she may have in my claim against her[.]" *Id.* at 6. When Parnar asked to respond, Judge Huddy refused. *Id.*

In his ruling Judge Huddy repeated Chanin's false statements about other judges. *Id.* at 7. "She was ordered by Judge Klein, Judge Soong, Judge Watanabe, Judge Chang [and] Judge Kaulukukui," remarked Judge Huddy, "to attend her deposition." *Id.* Judge Huddy suggested without proof and without permitting her to respond, that Parnar caused Chanin's failure to obtain written orders by removing them from his chambers. *Id.* "[I]t's very suspect," he said. *Id.*

"Parnar has made it clear that she does not intend to attend a deposition," Judge Huddy said, "until she gets counsel[.]" *Id.* at 8. "[T]hat's been her whole tactics." *Id.* "[I]t's for those reasons that the court grants the motion." *Id.*

Judge Huddy did not find bad faith, callous disregard or willful disobedience. *Id.* He did not specify a sanction. *Id.*

On August 8, 1995, Judge Huddy filed an order granting Chanin's oral motion for sanctions. RA-II at 329; *see* Appendix A. "Good cause appearing," Huddy ordered, "Parnar's counter-claim against Plaintiff is hereby dismissed" and "Parnar is hereby held in default as against the claims of Plaintiff[.]" *Id.*

I. Judgment for Dismissal and Default; Judge Heely.

On November 28, 1995, Chanin wrote Judge Huddy, attaching a proposed judgment for signature and a one-page affidavit explaining a $47,346.26 demand. RA-II at 336. Chanin mailed Parnar the cover letter but did not send the attachments. *Id.* The affidavit, which was later attached to the filed judgment, contained the following:

> 4. That the final invoice received by Defendant Eugenie Parnar was on February 5, 1991; 5. That the principal amount due and owing is $24,431.88; 6. That the pre-judgment interest of $13,437.55 is due and owing; 7. That the attorneys' fees is $7,581.46 and costs is $1,895.37 is [sic] due and owing;

RA-III at 5-6; *see* Appendix B. Chanin's averment that a final, $24,431.88 invoice was sent to Parnar on February 5, 1991, flatly contradicted his previous filings. *See*

Appendix C[10]. Chanin submitted no other "proof" for a judgment twice the size of the prayer in his complaint. *Id.* Parnar responded to Chanin's letter by filing "objections to entry of Plaintiff's November 28, 1995, judgment." RA-II at 336. She did not respond to his affidavit or $47,346.26 demand because she had not seen them. *Id.* Parnar noted she had not been served with the proposed judgment and asked for a proof hearing on damages under *HRCP* Rule 55(b)(2). *Id.*

On January 11, 1996, First Circuit Judge Daniel G. Heely signed Chanin's proposed judgment "for Judge Huddy." RA-III at 1; *see* Appendix B. Chanin's affidavit was attached. *Id.* There is no record that Judge Huddy reviewed Chanin's proposed judgment or affidavit, or adopted Chanin's demands. Chanin awarded himself $24,431.88 in principal, $13,437.55 in prejudgment interest, $7,581.46 in fees, and $1,895.37 in costs, or $47,346.26. *Id.*

J. Parnar's Motion to Open Judgment; Judge Heely.

On January 17, 1996, Parnar filed a motion under *HRCP* Rules 59 and 60 to open and amend judgment or for new trial. RA-III at 38. She argued $13,437.55 in interest was awarded in violation of *HRS* Section 636-16, without motion, without hearing, and without designating commencement date or interest rate. *Id.* at 110-112. She claimed Judge

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[10] On June 1, 1992, Chanin filed an affidavit in opposition to Parnar's motion for summary judgment, attaching a summary of account and multiple invoices sent to Parnar between February and December 1991. The final balance listed on Chanin's summary of account was $19,208.41, not $24,431.88. *See* Appendix C. Parnar is moving on even date herewith to supplement the record with this document, which was inexplicably omitted from the record on appeal.

Heely, who was new to the case and conducted no proof hearing, could not execute the judgment. *Id.* at 113-115[11].

Chanin filed papers in opposition, claiming his secretary served Parnar with the proposed judgment and affidavit, but arguing *HRCP* Rule 55 did not apply anyway because Parnar was "defaulted" under *HRCP* Rule 37. RA-III at 85-86. No court rules, claimed Chanin, governed Judge Heely's $47,346.26 default judgment. *Id.*

Judge Heeley heard Parnar's motion on January 31, 1996, and denied it without comment. 1/31/96 Tr. at 9. Transferred from First Circuit Judge Virginia Crandall's courtroom two days before, Judge Heely had 48 hours to review the file. RA-III at 184-185. He asked Chanin to "prepare an order which lists in detail the specific procedural background of the case[.]" 1/31/96 Tr. at 9.

Chanin submitted this order two weeks later, which stated:

> Plaintiff has been forced to file numerous motions to compel Defendant Parnar to appear for the continuation and completion of her deposition, and in spite of the fact that Defendant Parnar has been ordered to appear

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[11] Parnar also presented substantial evidence that Chanin had a major conflict of interest when he accepted representation of her in *Americana Hotels* in 1989. RA-III at 43. Chanin represented Parnar in *Americana* against lawyers Greeley, Walker & Kowen, without disclosing his prior association with lawyers in that firm. *Id.* Chanin and Greeley were former associates and Greeley was Chanin's personal lawyer for many years, including his own divorce case. *Id.* "If [Chanin] had disclosed this," said Parnar, "I would not have retained him[.]" *Id.* at 44.

> and allow for the continuation of her deposition, she has refused to do so;

RA-III at 2; *see* Appendix D. Chanin never obtained a valid order from any judge compelling attendance at a deposition under *HRCP* Rule 37(a), and Parnar could not "refuse to do so." *Id.* Chanin's proposed order claimed Judge Soong ordered Parnar to attend a deposition, when he never conducted any hearing in this case. *Id.* Chanin omitted any reference to his premature termination of the 1991 deposition. *Id.* He omitted Judge Klein's relevancy rulings. *Id.* He made no mention of *HRCP* Rule 55 or Parnar's grounds for filing the motion to open and amend judgment. *Id.* He made no reference to his affidavit, or the absence of a proof hearing. *Id.* He omitted his demands for $24,431.88 in principal, $7,581.46 in fees, $13,437.55 in prejudgment interest, and $1,895.37 in costs. *Id.* He ignored his failure to serve Parnar. *Id.* He made no attempt to justify Judge Heely's authority to file a judgment. *Id.*

Finally, Chanin's order asked Judge Heely to render findings covering four years of proceedings in which he played no role. *Id.* The matters raised in Parnar's motion were ignored in the order, while Judge Heely resolved countless others that were not. *Id.*

On February 20, 1996, Parnar filed objections to Chanin's proposed order. RA-III at 184, 206. On May 24, 1996, Judge Heely signed Chanin's proposed order unchanged. *See* Appendix D.

II. STATEMENT OF POINTS RELIED UPON.

A. Judge Huddy's Order Imposing Sanctions.

On March 24, 1995, Chanin filed a motion for sanctions against Parnar for failure to attend a March 22, 1995, deposition. RA-II at 228. He did not specify what sanctions. *Id.* Parnar filed opposition papers noting 1) no order was filed, 2) Parnar had no counsel, 3) Parnar had no files, and 4) the February 2, 1995, oral order and prior orders by other judges were obtained by fraud on the court. RA-II at 295. On April 19, 1995, Judge Huddy ruled:

> [T]he record indicates that the Plaintiff has been attempting to take Defendant's deposition for over three years. Trial is imminent, it's scheduled for the week of December 8, 1995. She was ordered by Judge Klein, Judge Soong, Judge Watanabe, Judge Chang, Judge Kaulukukui[,] and this court, most recently, to attend her deposition.

4/19/95 Tr. at 7. "Ms. Parnar has made it clear," ruled the court:

> that she has not--she does not intend to attend a deposition . . . until she gets counsel, and that's been her whole tactics [sic]. And, uh, it's for those reasons that the court grants the motion.

4/19/95 Tr. at 8. On August 8, 1995, Judge Huddy filed an order granting Chanin's motion for default. RA-II at 329; *see* Appendix A. "Good cause appearing," he ordered, "Parnar's counter-claim against Plaintiff is hereby dismissed" and "Parnar is hereby held in default as against the claims of Plaintiff[.]" *Id.* at 330.

The court erred. First, Chanin did not specify the sanctions sought in his motion. RA-II at 228. When he orally demanded dismissal and default at the hearing, Judge Huddy refused to let Parnar respond. 4/19/95 Tr. at 7. "[Y]ou may not." *Id.*

Second, neither the court's oral nor written rulings found bad faith, callous disregard or deliberate misconduct.

Third, Chanin never obtained an order directing Parnar to attend any deposition.

Fourth, the court's April 19, 1995, oral finding that Judges Klein, Soong, Watanabe, Chang, Kaulukukui and Huddy ordered Parnar to attend a deposition, was clearly erroneous.

Fifth, Judge Huddy denied Parnar due process by imposing a drastic sanction against her for failing to obey a discovery order, when she could not comply because she had no lawyer or files.

Sixth, neither Judge Huddy nor any other judge 1) warned Parnar she would suffer sanctions, 2) considered lesser sanctions, or 3) imposed lesser sanctions prior to the default in this case.

Seventh, all of the discovery orders obtained by Chanin from First Circuit judges--including Huddy's--were obtained by fraud.

B. Judge Heely's Judgment for Dismissal and Default.

On November 28, 1995, Chanin sent a letter, proposed judgment and one-page affidavit to Judge Huddy requesting

a judgment of default. RA-II at 336. Chanin copied the letter to Parnar, but did not send her the proposed judgment or affidavit. *Id.*

On December 4, 1995, Parnar filed objections to the proposed judgment based on the letter, informing Chanin she had not received the documents and requesting a proof hearing under *HRCP* Rule 55(b). *Id.* On January 11, 1996, Judge Heely signed Chanin's proposed judgment, "for Judge Huddy." RA-III at 1; *see* Appendix B.

Judge Heely erred. First, Chanin did not comply with *HRCP* Rule 55(b) because he did not serve the judgment and affidavit on Parnar prior to its entry by Judge Heely on January 11, 1996.

Second, because of Parnar's December 4, 1995, objections, both Chanin and Judge Heely knew Parnar had not received the proposed judgment and affidavit, which precluded her from challenging the amounts or claims therein. Nevertheless, Chanin never sent them to Parnar and Judge Heely signed the judgment without notice.

Third, Judge Heely did not preside over any hearing in this case before January 31, 1996. He ignored Parnar's request for a proof hearing, and had no idea whether Chanin's demands were fair, supported by evidence, or considered by Judge Huddy in his order of dismissal and default. Chanin's $24,431.88 principal demand was $5000 more than a summary of account balance supplied by Chanin in his opposition to motion for summary judgment. *See* Appendix C.

Fourth, Judge Heely awarded $13,347.55 for prejudgment interest although 1) it was not requested in the complaint, 2) it was not requested by motion, 2) the court picked no

commencement date or interest rate, and 3) the court made no finding on delays.

Fifth, Judge Heely awarded $7,581.46 for fees although, 1) Judge Huddy did not award them, 2) Chanin did not justify them in his affidavit, 3) fees were not authorized by contract, statute of court rule, and 4) Rule 37(b) fees are limited to "reasonable expenses" caused by the failure to comply with a discovery order.

Sixth, Judge Heely awarded $1,895.37 for costs although, 1) Judge Huddy did not award them, 2) Chanin did not justify them in his affidavit, 3) Rule 37(b) costs are limited to "reasonable expenses" caused by the failure to comply with a discovery order, and 4) Chanin did not file a bill of costs.

Seventh, Judge Heely's judgment was tainted by fraud on the court, with Chanin lying repeatedly in pleadings, affidavits and hearings throughout the proceedings leading up to the judgment.

C. Judge Heely's Order Affirming Judgment.

On January 17, 1996, Parnar filed a motion to open and amend judgment or for new trial, citing *HRCP* Rules 59 and 60(b). RA-III at 38, 110. She claimed 1) Chanin did not comply with *HRCP* Rule 55(b), 2) Judge Heely could not sign the judgment because he did not preside at the hearing, and 3) discovery orders leading up to the judgment were obtained by fraud on the court. *Id.*

Judge Heely heard Parnar's motion on January 31, 1996, and denied it without comment. 1/31/96 Tr. at 9. Because the motion was transferred from Judge Crandall's courtroom

two days before, Judge Heely had 48 hours to review the file. RA-III at 184-185. Unaware of the facts, Judge Heely asked Chanin to "prepare an order which lists in detail the specific procedural background of the case." 1/31/96 Tr. at 9. On May 24, 1996, Judge Heely signed Chanin's proposed order. RA-III at 211; *see* Appendix C.

The court erred. First, the May 24, 1996, order contained findings covering four years of proceedings in which Judge Heely played no role. Issues raised in Parnar's motion were ignored, while the court resolved issues scripted by Chanin that were not. Without transcripts, and without evidence, Judge Heely had no basis to adopt Chanin's proposed order.

Second, the May 24, 1996, order is clearly erroneous[12].

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[12] Paragraph 1 is wrong because the complaint was not filed in 1996. Paragraph 2 omits Chanin's rude termination of the 1991 deposition because of travel plans. Paragraph 3 is wrong because Chanin filed only two motions to compel, and neither resulted in signed orders. Paragraph 4 omits Judge Klein's relevancy rulings and Chanin's failure to obtain an order. Paragraphs 5 and 6 are wrong because Parnar declined to appear for other reasons. Paragraph 7 is wrong because Judge Soong never presided at any hearing in this case. Paragraph 8 is wrong because Chanin did not file a motion to compel in November 1993, and the hearing on Chanin's motion for sanctions was continued at his request. Paragraph 9 is wrong because Parnar did not attend this hearing. Paragraph 10 omits Judge Chang's refusal to impose sanctions. Paragraph 11 omits Chanin's failure to file a proposed order, and misstates the reasons for Parnar's motion for rehearing. Paragraph 12 is wrong because Kanae withdrew after the March 25, 1994, deposition date and was not dismissed by Parnar. Paragraphs 13-15 omit the fact that Chanin sent no notices of deposition to Parnar between April 1994 and January 1995. Paragraph 16 omits the fact that Chanin's subpoena was not in compliance with court rules, and his notice was unreasonable. Paragraphs 17-18 omit the fact that Judge Huddy granted part of Parnar's

(continued...)

Third, Judge Heely's May 24, 1996, order, like every other order announced or filed in this case, was tainted by fraud on the court by Chanin's lies in pleadings, affidavits and hearings.

III. QUESTIONS PRESENTED

A. SHOULD THIS COURT VACATE THE JUDGMENT OF DEFAULT, AND ENTER JUDGMENT FOR PARNAR, BECAUSE OF WHOLESALE, CONTINUOUS, AND OUTRAGEOUS FRAUD ON THE COURT BY CHANIN FROM 1992 TO 1996?

B. DID JUDGE HUDDY DENY PARNAR DUE PROCESS OF LAW BY IMPOSING DRASTIC SANCTIONS OF DISMISSAL AND DEFAULT WHEN SHE FAILED TO BE APPEAR FOR A DEPOSITION WITHOUT COUNSEL OR FILES, WITHOUT WARNING HER ABOUT SUCH SANCTIONS, AND WITHOUT CONSIDERING LESSER SANCTIONS?

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[12](...continued)
protective order, denied Chanin's request for sanctions, and did not warn Parnar of future sanctions. Paragraph 10 omits the fact that Chanin held Parnar's files so she could not prepare for her deposition or comply with his request for documents. Paragraphs 22-23 omit Chanin's failures to serve the proposed judgment, to justify his $47,346 demand, and to provide a proof hearing. The entire document fails to respond to Parnar's motion to open and amend judgment.

C. DID JUDGE HEELY ENTER A DEFECTIVE JUDGMENT WITH SPURIOUS DEMANDS IN VIOLATION OF *HRCP* RULE 55(B), AND DENY A MOTION TO OPEN AND AMEND, WITHOUT KNOWING ANYTHING ABOUT THE DISPUTED ISSUES IN THIS CASE?

IV. STANDARDS OF REVIEW

A. *Fraud upon the Court.* Whether a judgment is void because of fraud upon the court is a matter or law reviewable *de novo*. *Southwest Slopes v. Lum*, 81 Hawaii 501, 918 P.2d 1157 (App. 1996).

B. *Compliance with HRCP Rule 37.* Whether Judge Huddy complied with *HRCP* Rule 37 is reviewable *de novo*. *W. H. Shipman v. Hawaiian Holiday Macadamia Nut*, 8 Haw.App. 354, 802 P.2d 1203 (1990). Assuming compliance, whether Judge Huddy properly imposed a default and dismissal is reviewable under abuse of discretion. *Id.* Whether Judge Huddy denied Parnar due process of law by imposing these sanctions is a matter of law reviewable *de novo*. *Id.*

C. *Compliance with HRCP Rule 55(b).* Whether Judge Heely complied with *HRCP* Rule 55(b) is reviewable *de novo*. *Pogia v. Ramos*, 10 Haw.App. 411, 876 P.2d 1342 (1994). Assuming compliance, whether Judge Heely properly entered a default judgment without notice, without proof hearing, and without justification for the award, or properly denied a motion to open and amend judgment, are reviewable under abuse of discretion. *Id.*

V. ARGUMENT

A. THIS COURT SHOULD VACATE THE JANUARY 11, 1996, JUDGMENT BECAUSE IT WAS OBTAINED BY FRAUD ON THE COURT, AND ENTER JUDGMENT FOR PARNAR.

Chanin and Parnar appeared before five First Circuit judges with discovery disputes. Each new judge knew little or nothing about prior proceedings and relied, of necessity, upon the parties before them to explain the record.

Chanin, with 30-years' experience and a facility for glib oratory, represented himself. Bogetto and Kanae represented Parnar until April 1994, after which Parnar, a secretary, appeared pro se.

None of the judges in this case reviewed transcripts of prior hearings. Now that they have been prepared, Chanin's strategy is clear. In instances too numerous to mention, he lied. Faced with new judges each time in court, Chanin dissembled, distorted, and deceived. Vaunting his experience, his familiarity with judges, and his supposed knowledge of discovery rules, Chanin bullied and belittled his pro se opponent. "You get the flavor, your honor," he would wink at the court, "you see what's going on." "Every judge in this court," he said again and again, "has felt sorry for me and ordered this woman to attend a deposition in my office."

Chanin's four-year performance perpetrated a fraud on the court. He lied about the 1991 deposition. He lied about its termination, his questions, Bogetto's objections, and Parnar's answers. He lied about Judge Klein's ruling. He lied about Judge Klein's order. He lied about Judge Nagata, Judge Watanabe and Judge Soong. He lied about Judge Kaulukukui's continuance. He lied about Bogetto and Parnar. He lied about Parnar's lawyers. He lied about Parnar's discovery objections. He lied about Parnar's files. He lied about her counter-claim. He lied about her search for counsel. He lied about serving Parnar with the proposed judgment. He lied in his November 28, 1995, affidavit in support of judgment about his $24,431.88 principal demand.

Frequently Chanin's lies went unchallenged. Bogetto could not defend himself before Judges Kaulukukui, Chang or Huddy because he was not there. Parnar could not dispute Chanin's lies about hearings before Judges Klein, Kaulukukui, Nagata or Chang because she was not there. None of these judges challenged Chanin because they sat for only small portions of the case. Now that this Court has the whole record before it, Chanin's calumny is clear.

Granted, attorneys exaggerate. Chanin is not the first lawyer to gild lilies for a fee. At some point, though, advocacy becomes fraud. The record is rendered so distorted that the court cannot weigh the truth. An unbroken chain of lies led five judges on the First Circuit Court to a default judgment against Parnar.

HRCP Rule 60(b) addresses fraud on the court. "This rule does not limit the power of a court," states the final paragraph, "to set aside a judgment for fraud upon the court." *HRCP* Rule 60(b). "Fraud, misrepresentation, and

circumvention used to obtain a judgment," said the ICA last year, "are generally regarded as sufficient cause for the opening or vacating of the judgment[.]" *Southwest Slopes v. Lum*, 81 Hawaii 501, 505, 918 P.2d 1157 (App. 1996). "The possibility that Plaintiffs used fraud upon the court when obtaining the summary judgment in their favor," ruled the ICA, "motivates us to vacate and remand." *Id.*; *see also*, *Magoon v. Magoon*, 70 Haw. 605, 616, 780 P.2d 80 (1989) ("a court has inherent power to investigate whether a judgment was obtained by fraud"); *State v. Martin*, 56 Haw. 292, 294, 535 P.2d 127 (1975) ("implicit in the proper and orderly administration of justice"); *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285 (1978) ("the appropriate action to be taken in a case of fraud upon the court is for the injured party to seek [relief] from the judgment of the court.")

In 1944 the United States Supreme Court addressed fraud on the court and lawyers in classic language by Mr. Justice Black:

> [T]ampering with the administration of justice in the manner undisputably shown here involves more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Hazel-Atlas Glass v. Hartford Empire, 322 U. S. 238, 246 (1944). "Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." *Id.* at 245; *see also*, *Root Refining v. Universal Oil Products*, 169 F.2d 514, 522 (3d

Cir. 1948) ("it is a wrong against the institutions set up to protect and safeguard the public.")

"A number of courts have relied on the *Hazel-Atlas* as authority for the proposition that involvement of an attorney in the perpetration of the fraud is a key factor in the existence of fraud upon the court." 47 Am.Jur.2d, *Judgments*, Section 891 at 365 (1984). Professor Moore states the following about *Hazel-Atlas*:

> [A]n attorney of Hartford was implicated is perpetrating the fraud. We believe that this is important, for, while an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

Moore & Lucas, *Moore's Federal Practice*, V. 7, Section 60.33 at 60-359 (1982). "Fraud on the court," notes Professor Moore, "is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner[.]" *Id.* at 60-360; *see also*, *Haner v. Haner*, 373 P.2d 577, 579 (Utah 1062) (false statements by lawyers that prevent a party from prosecuting a claim or defense constitute fraud on the court.)

Defaults obtained by fraud upon the court are particularly vulnerable to reversal. "[D]ismissal of a pending action by the trial court with prejudice is not favored." *Azer v. Courthouse Racquetball Corp.*, 9 Haw.App. 530, 540, 852 P.2d 75 (1993); *see also* Wright, Miller and Kane, *Federal*

Practice and Procedure, Civil 2d, V. 9, Section 2681 at 402 (1983) ("defaults are not favored by the law and any doubts usually will be resolved in favor of the defaulting party"); *Trehan v. Von Tarkanyi*, 85 B.R. 920, 921 (S.D.N.Y. 1988) ("as a result of the fraud perpetrated by the Trehans the default judgment is void"); *Anno*, 78 A.L.R.3d 150 (1962), "Fraud in Obtaining or Maintaining Default Judgment as Grounds for Vacating or Setting Aside Judgment in State Courts."

Judgments are not vacated merely because perjured evidence is introduced at a hearing. *Chishom v. Stephenson*, 363 P.2d 229, 232 (Okla. 1961). "[I]t must be such fraud as to prevent the other from having a trial of the issues." *Id.* "Fraud upon the court embraces," declared the Montana Supreme Court recently:

> only that species of fraud which subverts or attempts to subvert the integrity of the court itself, *or fraud perpetrated by officers of the court* so that the judicial machinery cannot perform in an impartial manner.

In re Marriage of Miller, 902 P.2d 1019, 1022 (Mont. 1995) (emphasis added). "Fraud upon the court includes only the most egregious conduct," said the court, "such as the fabrication of evidence in which an attorney has been implicated[.]" *Id.* "[I]f our adversary system is to function according to design," said Justice Marshall in *Geders v. United States*, 425 U. S. 80, 93 (1976), "we must assume that

an attorney will observe his responsibilities to the legal system."[13]

By repeatedly lying in court documents and hearings, Chanin tainted the entry of every ruling in this case. He persuaded Judge Klein to deny a motion for termination. He convinced Judges Nagata and Chang to compel Parnar's appearance. He cajoled Judge Huddy into denying a protective order and entering a default. Judge Heely entered a $47,346.26 judgment. Chanin's misstatements "perpetrated a fraud upon the court." *People v. Radinsky*, 490 P.2d 951, 953 (Colo. 1971). The *Radinsky* court declared:

> If acts of this type that the respondent has committed are not promptly and severely punished, the public will not have reason to trust lawyers that maintain the high standards of our profession.

490 P.2d at 952. "Our most sacred duty is to maintain the integrity of the law profession by disciplining lawyers who

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[13] *See also, Virgin Islands Housing Authority v. David*, 823 F.2d 764, 767 (3d Cir. 1987) ("we believe that Maduro's argument perpetrated fraud upon the district court"); *Porter v. Goodyear Tire and Rubber*, 536 F.2d 1115, 1119 (6th Cir. 1976) ("since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court"); *Lockwood v. Bowles*, 46 F. R. D. 625, 633 (D.C.D.C. 1969) ("when [an attorney] departs from that standard in the conduct of a case he perpetrates a fraud upon the court"); *England v. Doyle*, 281 F.2d 304, 306 (9th Cir. 1960) ("unconscionable plan or scheme which is designed to improperly influence the court"); *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1338 (5th Cir. 1978), ("fabrication of evidence by a party in which an attorney is implicated is fraud upon the court"); *In re Intermagnetics America*, 926 F.2d 912, 916 (9th Cir. 1991) ("fraud upon the court includes both attempts to subvert the integrity of the court and fraud by an officer of the court.")

indulge in practices which are designed to perpetrate a fraud on the courts." *Id.*; *see also*, *In re French*, 28 Haw. 47, 59 (1924) (attorney disbarred for giving "deliberately false" testimony.)

B. PARNAR'S OBJECTIONS TO DISCOVERY WERE FOUND SUBSTANTIALLY JUSTIFIED BY EVERY JUDGE IN THIS CASE INCLUDING JUDGE HUDDY BEFORE HE ENTERED A DEFAULT AND DISMISSAL BECAUSE SHE WOULD NOT ATTEND A DEPOSITION WITHOUT COUNSEL OR FILES.

"A general limitation on the right of discovery," said the ICA in *Lothspeich v. Sam Fong*, 6 Haw.App. 118, 711 P.2d 1310 (1985), "is that the information sought must be `relevant to the subject matter involved in the pending action.'" *Id.* at 122, *quoting*, *HRCP* Rule 26(b)(1). "Depositions are properly taken only for the purposes of preparing for trial[.]" *Id.* *HRCP* Rule 30(d) provides:

> At any time during the taking of the deposition, on motion of a party . . . and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, *or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c).*

HRCP Rule 30(d) (part) (emphasis added).

On December 4, 1991, after a one-hour, irrelevant, obnoxious interrogation, Chanin terminated a deposition because of travel plans requiring his departure two hours after Parnar arrived.

On January 12, 1992, Parnar filed a motion under *HRCP* Rule 30(d) to terminate or limit the scope and manner of her deposition.

On March 3, 1992, Judge Klein told Chanin he had conducted an improper interrogation. "35 pages to establish nothing," said Judge Klein, "you were just asking basically a lot of irrelevant questions." 3/3/92 Tr. at 5,7. After reviewing the complaint and the counterclaim, and reading the deposition transcript, Judge Klein called Chanin's performance "a total waste of time." *Id.*

For three years after this oral ruling Parnar asked Chanin to file a proposed order reducing Judge Klein's order to writing, "limit[ing] the scope and manner of the taking of the deposition as provided for in Rule 26(c)." *HRCP* Rule 30(d). Bogetto wrote letters to Chanin and asked judges to order his compliance with *HCCR* Rule 23, so a deposition could be conducted "relevant to the subject matter involved in the pending action." *HRCP* Rule 26(c).

Bogetto never obtained a written order by Judge Klein "limiting the scope and manner" of Parnar's deposition. This and other objections were presented by Bogetto, Kanae and Parnar pro se to Judges Nagata, Chang and Huddy. Neither Parnar nor her lawyers were sanctioned by any judge--including Judge Huddy--until Judge Huddy entered a default and dismissal in this case.

"In an appeal from an order imposing sanctions under Rule 37(b), said the ICA in *Lothspeich*, *supra*, "the appellate court will consider the propriety of the underlying discovery order." 6 Haw.App. at 124 "A good faith dispute concerning a discovery question can, in a proper case, constitute substantial justification for refusing to give discovery." *Id.*

Judges Klein, Kaulukukui, Nagata, Chang, and Huddy, acknowledged Parnar's substantial justification for refusing to attend Chanin's deposition dates by failing to impose sanctions:

> If the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, *unless the court finds that the opposition to the motion was substantially justified or that the circumstances makes an award of expenses unjust.*

HRCP Rule 37(a)(4)(part) (emphasis added). When Judge Nagata granted Chanin's motion to compel he refused his demand for "reasonable expenses" under Rule 37(a)(4). 9/24/93 Tr. at 10. When Judge Chang ordered Parnar to attend a deposition he declined Chanin's request for expenses. 3/4/94 Tr. at 18. When Judge Huddy denied Parnar's motion for protective order he rejected Chanin's request for expenses. 2/2/95 Tr. at 14.

HRCP Rule 37(a)(4) *mandates* an award of reasonable expenses to the prevailing party "unless the court finds that

the opposition to the motion was substantially justified[.]" *Id.* The refusals to award Chanin "reasonable expenses" in 1993, 1994, and 1995 meant Parnar's objections to Chanin's notices of deposition were "substantially justified." *Id*[14]. "Substantially justified" has been defined by Wright, Miller and Marcus to mean:

> the motion raised an issue about which reasonable people could genuinely differ whether a party was bound to comply with the discovery rule.

Wright, Miller and Marcus, *Federal Practice and Procedure, Civil 2d*, Section 2288 at 665 (1994). "In such cases the losing party is substantially justified in carrying the matter to court." *Id.* at 666, n.30, *quoting*, *Advisory Committee Note* (1970).

When Parnar declined to attend the March 22, 1995, deposition, her reasons were "substantially justified." First, Chanin refused to submit an order to Judge Klein to set limits on the deposition and had shown he would use it to harass Parnar. Second, Parnar had no lawyer, and Judge Huddy's order directing Parnar's attendance at a deposition in 30 days made it impossible to get one. Third, Chanin refused to give Parnar the *Americana Hotels* files, and without them she could not prepare for her deposition or trial.

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[14] In *Aloha Unlimited v. Coughlin*, 79 Hawaii 527, 904 P.2d 541 (App. 1995), the ICA applied similar reasoning when expenses *were imposed* after a hearing. "Implicit in the court's order awarding fees and costs is the finding that Aloha's failure to timely appear for the deposition was not justified." 79 Hawaii at 534.

Judge Huddy abused his discretion in defaulting and dismissing Parnar's defenses and counterclaims since she was substantially justified in refusing to attend the March 22, 1995, deposition.

C. JUDGE HUDDY DID NOT FIND PARNAR ACTED IN BAD FAITH, OR JUSTIFY THE IMPOSITION OF THE DRASTIC SANCTION OF DEFAULT AND DISMISSAL IN THIS CASE.

Judge Huddy entered a default and dismissal because Parnar could not find a lawyer, and "does not intend to attend a deposition until she gets counsel[.]" 4/19/95 Tr. at 8. "It's for those reasons," he said, "that the court grants the motion." *Id.*

Parnar contacted 70 lawyers after Kanae withdrew in April 1994. She submitted paid advertisements to the *Star Bulletin*, the *Honolulu Advertiser* and the *Hawaii State Bar Journal*, seeking counsel. Parnar "has made some effort to obtain counsel," Judge Shimabukuro said, "by the nature of this case maybe some attorneys are avoiding it." 9/7/94 Tr. at 12-13. "For one reason or another," Judge Huddy acknowledged, "you have been *unable* to engage or retain other legal counsel." 2/2/95 Tr. at 14 (emphasis added).

Judge Huddy did not find Parnar guilty of bad faith, abusive litigation practices, callous disregard, or a willful failure to obey a court order. 4/19/95 Tr. at 13. He entered default because Parnar refused to attend a deposition without files or counsel.

In *W. H. Shipman v. Hawaiian Holiday Macadamia Nut*, 8 Haw.App. 354, 802 P.2d 1203 (1990), the ICA adopted a five-factor test which a trial court *must* weigh before imposing drastic sanctions:

> (1) the public's interest in the expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Shipman, *supra*, 8 Haw.App. at 362, *quoting*, *United States ex rel. Wiltec Guam v. Kahaluu Construction*, 857 F.2d 600, 603 (9th Cir. 1988); *see also*, *Aloha Unlimited v. Coughlin*, 79 Hawaii 527, 532, 904 P.2d 541 (App. 1995) ("five factors"). "[T]he trial court must articulate on the record its reasons for dismissing the complaint." *Id.*, *quoting*, *Quality v. Keating*, 675 F.2d 77, 79 (3d Cir. 1982).

More importantly, "in the absence of a showing of bad faith, willfulness, or callous disregard of the rights of other litigants," ruled the *Shipman* court, a default is "an abuse of discretion." *Id.* at 361; *see also*, *Aloha Unlimited*, *supra*, 79 Hawaii at 533 ("the element of willfulness is required when the sanction [is] harsh"); *Kukui Nuts of Hawaii v. R. Baird and Company*, 6 Haw.Haw. 431, 436, 726 P.2d 268 (1986) ("[w]e adopt the bad faith requirement"); *Azer v. the Courthouse Raquetball Corp.*, 9 Haw.App. 531, 540, 852 P.2d 75 (1993) ("[a]n appellate court will uphold a dismissal with prejudice only where the record clearly shows delay or contumacious conduct[.])"[15] Courts apply this standard

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[15] Federal courts are in accord. *See e.g.*, *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993) ("default judgment sanction

(continued...)

equally to sanctions sought under *HRCP* Rules 37(b) or 37(d). *See, e.g., Shipman*; *Aloha*; *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980). Wright, Miller and Marcus declare:

> If the failure is because of inability to comply, rather than willfulness, bad faith, or any fault of the party, the action should not be dismissed, nor a default judgment given, and less severe sanctions are the most that should be invoked.

Wright, Miller & Marcus, *Federal Practice and Procedure, Civil 2d*, Section 2284 at 621-622 (1994), *citing*, *Bank Atlantic v. Blythe Eastman*, 12 F.3d 1045 (11th Cir, 1994).

Finally, whether or not Judge Huddy abused his discretion under *HRCP* Rule 37, he denied Parnar due process of law:

> there are constitutional limits, stemming from the Due Process Clause of the Fifth and Fourteenth Amendments, on the imposition of sanctions.

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[15](...continued)
requires a willful or bad faith failure to obey a discovery order"); *Regional Refuse Systems v. Inland Reclamation*, 842 F.2d 150, 153 (6th Cir. 1988) ("a sanction of last resort may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith or fault"); *Dorsey v. Academy Moving & Storage*, 423 F.2d 858, 860 (5th Cir. 1970) ("[s]anctions available under Rule 37(b) are predicated upon the presence of such factors as willful disobedience, gross indifference to the right of the adverse party, deliberate callousness, or gross negligence"); *Independent Productions v. Leow's*, 283 F.2d 730, 733 (2d Cir. 1960) ("dismissal of an action with prejudice or the entry of a judgment by default are drastic remedies and should be applied only in extreme circumstances.")

Wright, Miller & Marcus, *Federal Practice and Procedure, Civil 2d*, V. 8A, Section 2283, at 605 (1994), *citing*, *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995). "[B]efore imposing a serious merits sanction, the court should determine whether the party guilty of failure to provide discovery was unable to comply[.]" *Id.*

In *Shipman*, *supra*, the ICA quoted the U. S. Supreme Court:

> Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith or any fault of petitioner.

8 Haw.App. at 361, *quoting*, *Societe International v. Rogers*, 357 U. S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). "The courts have heeded," declare Wright, Miller and Marcus, "the doctrine of the *Societe Internationale* case[.]" Wright, Miller and Marcus, *supra* at 609, *citing*, *Nat. Hockey League v. Metropolitan Hockey*, 427 U. S. 639 (1976). "[T]he sanction of dismissal cannot be imposed if the failure was due to inability to comply." *Id.*

None of the judges that heard motions in this case--including Huddy--found Parnar guilty of bad faith. None imposed sanctions. None awarded expenses, struck defenses, barred evidence, adjudged contempts, or imposed any other sanction described in court rules. "[C]ertain things weren't filed," said Judge Nagata in 1993, "so I'm not going to award any sanctions." 9/24/93 Tr. at 12.

Huddy ordered default and dismissal because 1) Parnar could not obtain counsel, and 2) she would not attend a deposition without it[16]. This sanction was imposed "on a party who had made a good faith effort to comply" and it contravened the Due Process clauses in the United States and Hawaii Constitutions.

D. PARNAR WAS NOT WARNED OR SANCTIONED PRIOR TO THE DEFAULT, AND THERE IS NO INDICATION JUDGE HUDDY CONSIDERED A LESS DRASTIC SANCTION.

"[A]s a general rule," declared the ICA in *Shipman*, *supra*, "the [trial] court must consider less severe alternatives and discuss them if it elects to dismiss." 8 Haw.App. at 364; *see also*, *Aloha*, *supra*, 79 Hawaii at 535 ("[the] court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions.") "[T]he reviewing court," declared the ICA in *Shipman* and *Aloha*, "[will] look to whether the [trial] court warned of the possibility of dismissal." *Id*[17].

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[16] In *Flaks v. Koegel*, 504 F.2d 702 (2d Cir. 1974), the court vacated an order striking an answer for failure to appear for a deposition. Defendants, the court noted, "were faced with the problem of obtaining new counsel after their original counsel had been relieved[.]" 504 F.2d at 704.

[17] Federal courts are in accord. *See e.g.*, Wright, Miller & Marcus, *Federal Practice and Procedure, Civil 2d*, Section 2284 at 620 (1994) ("most [courts hold] some consideration of alternative sanctions should occur"); *Poulos v. Naas*, 959 F.2d 69, 75 (7th Cir. 1992) ("[w]e have recommended that courts consider lesser sanctions before imposing default judgments"); *Avionic v. General Dynamics*, 957 F.2d 555, 558

(continued...)

In *Aloha* the ICA adopted a three-step test for determining whether the trial court considered less drastic sanctions:

> (1) Did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate? (2) Did the court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn the [party] of the possibility of dismissal before actually ordering dismissal?

Aloha, *supra*, 79 Hawaii at 535, *quoting*, *United States v. National medical Enterprises*, 792 F.2d 906, 912 (9th Cir, 1986). The answers to these questions in this case are no, no and no.

First, as noted, prior to Judge Huddy's order of default, no court filed any order awarding expenses, striking defenses,

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[17](...continued)
(8th Cir. 1992) ("before dismissing a case under Rule 37(b)(2) the court must investigate whether a sanction less extreme than dismissal would suffice"); *Shea v. Donohoe*, 795 F.2d 1071, 1075 (D.C. Cir. 1986) ("dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored"); *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) ("consider the availability of less drastic sanctions"); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 121 (10th Cir. 1992) ("the efficacy of lesser sanctions"); *Coane v. Ferara Pan Candy*, 898 F.2d 1030, 1032 (5th Cir. 1990) ("the lesser sanction must be an inefficacious deterrent"); *Schilling v. Walworth County Park*, 805 F.2d 272, 275 (7th Cir. 1986) ("requires that a district court consider less severe sanctions and explain, where not obvious, their inadequacy for promoting the interests of justice.")

designating facts, barring evidence, or imposing any other punishment. Parnar's first sanction was her last.

Second, there is no indication in the April 19, 1995, transcript--when Judge Huddy entered a default against Parnar--that the court considered the use of less drastic sanctions.

Third, there is no indication in the February 2, 1995, transcript--when Judge Huddy denied Parnar's motion for protective order and ordered her to attend a deposition without counsel or files--that he would impose sanctions if she failed to appear.

As Judge Tanaka concluded in *Shipman*, "there was neither a warning of the possibility of . . . a default judgment in favor of Shipman, nor did the court consider less severe alternative sanctions[.]" 8 Haw.App. at 364. "Accordingly, we hold that the lower court abused its discretion in imposing [a default.]" *Id.* at 365; *see also*, *Azer v. Courthouse Raquetball*, *supra*, 9 Haw.App. at 540 ("we are not convinced that the record clearly shows . . . lesser sanctions would not serve the best interests of justice.")

E. THE JANUARY 11, 1996, JUDGMENT WAS ENTERED IN VIOLATION OF *HRCP* RULE 55(b), AND IMPROPERLY SIGNED BY A DIFFERENT JUDGE.

Chanin demanded $24,346 in his complaint. Judge Heely gave him $47,346 in his judgment. "A judgment by default may not be different in kind or exceed in amount that prayed for in the demand for judgment." *HRCP* Rule 54(c). "*HRCP* Rule 54(c) restricts the scope of relief that may be granted by

default judgment to that specifically prayed for." *Matsushima v. Rego*, 67 Haw. 556, 559, 696 P.2d 843 (1985); *see also*, *Bank of Hawaii v. Horworth*, 71 Haw. 204, 787 P.2d 674 (1990); Wright, Miller and Kane, *Federal Practice and Procedure, Civil 2d*, V. 9, Section 2689 at 453 (1983).

Defaults are addressed in *HRCP* Rule 55. "Application for the entry of a judgment by default must be made to the court under Rule 55(b)(2)." Wright, Miller & Kane, *supra*, Section 2684 (1996 Supp. at 104), *citing*, *Zeviar v. Local No. 2747*, 733 F.2d 556 (8th Cir. 1984). "[D]efault," notes the rule, "may be entered as follows:"

> If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averments by evidence or to make an investigation of any other matter, the court may conduct hearings or order such references as it deems necessary and proper[.]

HRCP Rule 55(b)(2). Neither Chanin nor the court complied.

First, Chanin did not send his proposed judgment to Parnar before it was signed. "[T]he plain language of *HRCP* Rule 55(b)(2) indicates that," the ICA has ruled:

> the obligation to serve written notice of an application for default judgment attaches where the defaulted party

> has appeared in the action. Therefore, where a "defendant has appeared in the action she has a right to notice under Rule 55(b)(2) even if in default." *Stafford v. Dickison*, 46 Haw. 52, 59, 374 P.2d 665 (1962).

Pogia v. Ramos, 10 Haw.App. 411, 419, 876 P.2d 1342 (1994).

Parnar "appeared in the action," and Rule 55(b)(2) mandates notice "three days prior to the hearing" on such application:

> This enables a defendant in default to appear at a subsequent hearing on the question of damages and contest the amount to be assessed against him.

Wright, Miller and Kane, *supra* at 413 (1983). "A failure to give the three days' notice when it is required generally is considered a serious procedural error that justifies the reversal or the setting aside of a default judgment." *Id.* at 438, *citing*, *Marshall v. Boyd*, 658 F.2d 552, 554 (8th Cir. 1981); *Wilver v. Fisher*, 387 F.2d 66, 70 (10th Cir. 1967); *Wellsville Bank v. Sutterby*, 752 P.2d 700, 702 (Kan.App. 1988); *Magness v. Masonite*, 671 S.W.2d 230, 231 (Ark.App. 1984); *Cutillo v. Gerstel*, 477 A.2d 750, 753 (Me. 1984).

Second, there was no proof hearing. Except for Judge Huddy's order and Chanin's affidavit, Judge Heely had no idea why a default was entered, what Chanin requested in his complaint, or what Judge Huddy intended to award Chanin. Further, the $24,431.88 principal demand flatly contradicted

the $19,208.41 closing balance reported by Chanin in his opposition to summary judgment. *See* Appendix C.

Because she was not served with the judgment and affidavit, Parnar could not challenge them. And if she had reviewed those documents, she would not have known Chanin's reasons. He listed none. This case required a proof hearing under Rule 55(b), especially after Judge Heely replaced Judge Huddy, and was asked to sign a judgment twice the size of Chanin's complaint.

"[T]he defaulting party still has standing to contest the amount of damages." *Pogia, supra*, 10 Haw.App. at 418; *see also, Occidental Underwriters v. American Security Bank*, 5 Haw.App. 431, 433, 696 P.2d 852 (1985) ("[the defaulting party] has standing to contest the amount of its liability.")

Third, Chanin proffered no justification for principal, fees, costs or prejudgment interest. His affidavit offered nothing. The expenses allowable under *HRCP* Rule 37(b) are described as follows:

> In lieu of any of the foregoing order or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both *to pay the reasonable expenses, including attorneys fees, caused by the failure*, unless the court finds that the failure was substantially justified or that other circumstances make an award of fees unjust.

HRCP Rule 37(b)((part) (emphasis added). "The expenses that may be recovered under it are those caused by the failure to obey an order[.]" Wright, Miller & Marcus, *Federal Practice and Procedure, Civil 2d*, V. 8A, Section 2289 at

674 (1994), *citing, Toth v. Trans World Airlines*, 862 F.2d 1381, 1385 (9th Cir. 1988).

Chanin asked for $7,581.46 in fees absent statute, contract or court rule. *See Kukui Nuts of Hawaii v. R. Baird*, 6 Haw.App. 431, 436, 726 P.2d 268 (1986) ("attorney's fees and costs may not be awarded absent statute, agreement, stipulation, or precedent authorizing the allowance thereof"); *Cuerva v. Wong*, 1 Haw.App. 194, 201, 616 P.2d 1017 (1980) ("fees may not be awarded unless such award is authorized by statute, stipulation or agreement[.]")

Further, while fees and costs may be awarded "as a sanction for abusive litigation," there was no such finding here. *See Kukui Nuts of Hawaii v. R. Baird*, 7 Haw.App. 598, 624, 789 P.2d 501, *cert. denied*, 71 Haw. 668, 833 P.2d 900 (1990). "[T]he court is required to make a specific finding of bad faith," and "no such finding was made in this case." *Id.* at 624, 626.

Fourth, Judge Heely awarded Chanin $13,436.55 in prejudgment interest without designating a commencement date or interest rate, or considering delay. According to *HRS* Section 636-16:

> In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case[.]

"[I]f Section 636-16 prejudgment interest [is] to be awarded, the designation of its commencement date [is] absolutely necessary." *Rodrigues v. Chan*, 5 Haw.App. 603, 607, 705 P.2d 67 (1985); *see also, Schmidt v. Marco Polo Apartments*, 73 Haw. 526, 836 P.2d 479 (1992). "Since the trial court did

not designate the commencement date, it [could] not award any prejudgment interest." *Id.* at 607.

Fifth, Chanin had no grounds to receive costs in this case, since they are not authorized under *HRCP* Rule 37(b), and he did not comply with *HRCP* Rule 54(d) or file a bill of costs.

Sixth, Judge Heely was not authorized to sign the January 11, 1996, judgment, or the May 24, 1996, order denying Parnar's motion to open and amend judgment, because he was not the judge that heard Chanin's default motion in this case. In 1995 this Court declared:

> In civil trials, "[t]he normal rule is that only the judge who conducted the trial may enter the decision in a case." *In re Judicial Determination of Death of Elwell*, 66 Haw. 598, 601, 670 P.2d 822, 824 (1983).

Raines v. State, 79 Hawaii 219, 222, 900 P.2d 1286 (1995).

VI. CONCLUSION.

This Court should vacate the judgment, reverse the default and dismissal, enter judgment against Chanin on his complaint and a default against Chanin on Parnar's counter-claim.

DATED: 4/22/97, in Honolulu, Hawaii.

Respectfully submitted:

/s/ PETER VAN NAME ESSER

Peter van name esser
Attorney for Defendant-Appellant
EUGENIE PARNAR

Appendix X
Petitioner's Reply Brief

s.c. No. 19946

IN THE SUPREME COURT OF
THE STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff-Appellee,

vs.

EUGENIE PARNAR,
Defendant-Appellant.

EUGENIE PARNAR,
Counterclaimant and Appellant,

vs.

THE LAW OFFICES OF
JOHN A. CHANIN,
Counterclaim-Defendant and Appellee.

Civil No. 90-1843

APPEAL FROM

1) THE JUDGMENT FILED ON JANUARY 11, 1996,
AND

2) THE ORDER DENYING DEFENDANT EUGENIE PARNAR'S MOTION TO OPEN AND AMEND JUDGMENT ENTERED JANUARY 11, 1996, FILED MAY 24, 1996.

FIRST CIRCUIT COURT

HON. Robert G. Klein
HON. Francis Q.F. Wong
HON. Russell Nnagata
HON. Barry Kurren
HON. Thomas Kaulukukui, Jr.
HON. Virginia L. Crandall
HON. Kevin S.C. Chang
HON. Wilfred K. Watanabe
HON. Colleen K. Hirai
HON. Herbert Shimabukuro
HON. Wendell K. Huddy
HON. Karen N. Blondin
HON. Gail C. Nakatani
HON. Danial G. Heely
Judges

[Filed]
[1997 Sept - 22 1:37 PM]
[K. Miyamura]
[Clerk Supreme Court]

APPELLANT'S REPLY BRIEF
and
CERTIFICATE OF SERVICE

EUGENIE PARNAR
252 Paoa Place, #3-3
Honolulu, Hawaii 96815
Telephone: (808)955-5050

Defendant-Appellant and Counterclaimant
Pro se

I. INTRODUCTION

Appellee ("Chanin") filed a "purported" answering brief, entitled "Appellant's [sic] Answer to Appellant's Opening Brief," two and one-half months after it was due after failing to timely apply for extension, and in contempt of an order to show cause.

Chanin has categorically failed or refused to address the points established by Appellant's ("Parnar") Opening Brief. In six pages under "Statement of the Case" and one and one-half pages under "Argument," Chanin refused to cite any legal authorities, or any part of the record on appeal to rebut the points of error in the Opening Brief and improperly attached appendices. No refutation to the arguments in the Opening Brief constitutes an admission of the points established by Parnar and her statement of facts should be accepted as true.

Chanin states that "[t]he principle disagreement" which Chanin has with Parnar's statement of the underlying cases "is the fact that Chanin was hired by Parnar for one specific purpose and that was to oppose the fees which were being claimed by attorney Michael Lilly, Esq." AB at 1. Chanin further states in para. 2, AB at 1:

> The assertion that Chanin was also hired to pursue as [sic] appeal to the United States Supreme Court, is inaccurate. The fact of the matter was that Appellant was only hired for the particular purpose of opposing the fee claim of Mr. Lilly.

That is totally untrue. Chanin's Verified Complaint, RA-I at 2, para. 3 and 4, and Plaintiff's Pretrial Statement, RA-I at 127, 128, specifically claims for services in First Circuit Civil No. 52878, *Eugenie Parnar v. Americana Hotels, Inc.*, et al. ("*Americana*") and the appeal to the U.S. Supreme Court for which he now denies representation. This is substantiated by Chanin's billing for such services RA-I, 201-246, and the records of *Americana*.

Chanin tries to distance himself from *Americana* because of Chanin's undisclosed conflicts of interest which legally precluded him from undertaking any representation of Parnar in that case. RA-III at 42-44, 46, 47, 116-119, 123, 124, 126-141, 160, 161, 175, 179, OB at 15, 16. All of Chanin's representation for Parnar was provided as to *Americana*, RA-I at 2, para. 3, in which Mr. Burnham H. Greeley's ("Greeley") firm, Greeley, Walker & Kowen opposed Parnar, (RA-I at 175, 176, 217-220, RA-III at 131, 132) even having the firm's lead counsel, Richard Kowen, testify as a hostile witness against Parnar for Michael Lilly ("Lilly") in her fee dispute with Lilly, while continuing as lead counsel. RA-III at 117. Chanin and Greeley were former associates and Greeley was Chanin's personal lawyer for many years, including his divorce case. RA-III at 42-44, 46, 47, 116-118, 123, 124, 126-129, 160, 161, 175-179, OB at 15,16. Chanin undertook representation as an advocate and connived at her defeat. Chanin's invoicing establishes the improper conflict activity between the two firms as

evidenced by Exhibit "C," page 3, attached to Defendant Eugenie Parnar's Motion for Summary Judgment, (RA-I at 223), which revealed:

> 11/15/88 0.20 REVIEW LEGAL RESEARCH FROM GREELEY'S OFFICE RE ATTORNEY'S FEES

Chanin's reference to David Schutter ("Schutter"), AB at 1, is falsely stated. The letter dated October 13, 1988, was not addressed to Chanin, but to Lilly, and was that which caused Parnar to require other counsel. Lilly phoned Parnar wanting to hurriedly divide the money in her trust account because Schutter had sent a letter threatening to sue. When Parnar said she wanted any division to be made at the end of her case, Lilly angered and stopped working on her case. RA-III at 118. Chanin advised payment to Schutter when Parnar had a viable defense due to Schutter's egregious conduct.[1] Chanin transacted overpayment to Schutter and then did nothing to correct the error when Parnar brought it to their attention.

Chanin's Brief contains other false statements. Chanin asserts that his false and fraudulent billings were due to a

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[1] On the day of trial, Schutter tried to force settlement of $115,000, by threatening to have Parnar declared incompetent and have a guardian appointed to sign for that amount and then made good his threat in open court and before Defendant's attorneys by spontaneously initiating a competency hearing. Parnar was forced–without notice of motion or notice of hearing, and without counsel–to spontaneously defend herself and her constitutional right to trial. The attorney-client relationship visibly broken, Parnar asked the Court for a week's continuance to seek legal advice. The Court oppressively gave her "one day," during which Parnar was forced to find new counsel. RA-III at 118, 119.

faulty computer and were "corrected." AB at 1, 2. First, it should be noted that no billings would have been generated had Chanin disclosed his conflicts of interest to Parnar. He would not have been retained to generate any billings whatsoever. The record, however, includes uncorrected associate raises, invoicing so padded as to reflect 55 hours in one day for one attorney work (RA-I at 246, RA-IV at 81); satisfaction to himself of $520.02 (RA-I at 249, RA-IV at 94), from Parnar's trust account *after* initiating this suit without notifying the Court, continuing to bill after Parnar had retained other counsel and the firm had withdrawn as counsel, and commingling of invoicing. RA-I at 221-251, RA-IV at 33-106.

Chanin, without referencing the record, refers to "Judge Nagata" expressing a certain "disbelief" regarding the hearing on the fee dispute with Mr. Lilly in *Americana*. AB at 2. That is a totally false statement as evidenced by the records in that case. Judge Nagata had absolutely nothing to do with that hearing. Further, the assertion of "disbelief" is false. Chanin's failure to cite from the record to support such bald assertions is an example of his repeated misconduct in this case.

Judge Hiroshi Oshiro was the judge in the Lilly fee dispute hearing. RA-I at 175, 176. It is significant that Chanin tries to mislead this Court with this false statement because Judge Oshiro is listed as a personal witness for Chanin to advance Chanin's private interests in this suit for money damages against Parnar. Chanin's Pretrial Statement, filed 11/22/91, RA-I at 128, declares Judge Oshiro as a witness for him:

> The Honorable Hiroshi Oshiro, 1111 Alakea Street, Honolulu, Hawaii 96813, will testify to liability and damage.

Chanin's Settlement Conference Statement, filed August 10, 1994, RA-II at 181, also declares Judge Oshiro as a witness for Chanin:

> The Hon. Hiroshi Oshiro, 1111 Alakea Street, Honolulu, HI 96813 [w]ill testify as to liability and damages.

Chanin's representation to this court that Judge Nagata was the hearing judge, when in fact Chanin's own "witness," Judge Oshiro was the judge, is another example of the false statements perpetrated by Chanin in these matters. Judge Oshiro's alignment with Chanin by stepping down from the bench to assume the role as Chanin's witness advocate is fatal to impartiality. Parnar requested a jury trial on her breach of contract claim against Lilly. Judge Oshiro denied it. Parnar's calculations of Lilly's fees were based on Lilly's own hourly rate, not as Chanin misrepresents. Chanin's work as to the Lilly fee dispute hearing was so negligent as to include failure to obtain an expert witness to counter their expert and to allow Lilly's Firm to clean out and spend Parnar's entire jury award of lost wages and emotional distress damages from her client trust account prior to the ten-day automatic stay provisions and final adjudication.

Chanin further claims various judges had certain reactions in the proceedings below, but fails to cite the record. AB at 5, 6. On the contrary, judges below weren't so sympathetic to Parnar. Judge Huddy negated Parnar's chance to obtain counsel by setting a trial date during the Christmas holiday

period, even after he was informed by Parnar that an attorney she had contacted would be available to represent her only after the middle of the following March due to his trial schedule. Thus, Judge Huddy effectively denied her counsel. RA-II at 267-268, 315, 316, 333, RA-III at 190.

Further, Chanin alludes to some pleadings having "disappeared" from the shelves outside the court's chambers thus insinuating theft by Parnar. AB at 6, 7. If Chanin has any evidence of breaches of court security, he should report it to the proper authorities and a thorough investigation should be launched. Cameras and security prevail at the Court as to entry of secured areas and could serve well to substantiate whether Chanin ever submitted whatever he alleges disappeared. The Court's use of this charge denied Parnar due process and ignored Chanin's repeated failure to tender discovery orders pursuant to Rule 23, HRCC to Judges Klein, Kaulukukui, Nagata, Chang, and Huddy in this case. *See* 4/19/95 Tr. at 7-8, OB at 14.

Chanin devotes AB at 3-7 to "The Parnar Deposition," but fails or refuses to cite any part of the record on appeal to support his assertions. The record establishes that Chanin terminated the deposition because he "had to leave at 11:30 a.m. to go to the airport to catch a flight to the mainland," used improper tactics, and asked irrelevant questions, (RA-I at 133-138, RA-III at 186, 187) all of which were recognized by Judge Klein at the hearing on Parnar's motion to terminate, 3/3/92 Tr. at 3 et. seq., at which Judge Klein verbally limited Chanin's deposition tactics. Chanin's claim, AB at 7, that "Judge Klein did not consider the fact that a counter-claim had been filed" is proved false by Judge Klein stating, "I was trying to think of where in the pleadings, having looked at the counterclaims, the defenses, the

affirmative defenses and the case in chief, what this is related to." 3/3/92 Tr at 3, *see* OB at 3, 4, 11, 12.

Chanin's statements as to Parnar's files are false. AB at 5. The record shows that Chanin ignored repeated requests for the return of her files RA-III at 119-121, 124, 125, 144-147. He states:

> Further, every time this issue was raised by Parnar as an attempt to delay this case, the various judges ruled that the issue had in fact been exhausted and had nothing to do with the fee dispute or the counter-claim as set out in the pleadings. In other words, Parnar was continually ordered to arrange for the taking of her deposition her unsubstantiated assertions about the missing files notwithstanding.

As evidenced by the record, no judge ever ruled that the files "had nothing to do with the fee dispute or the counter-claim." The Chanin files and the files of *Americana*, turned over to Chanin, to the contrary, are of primary relevance, so relevant that Chanin fabricates fictitious rulings that "various judges" ruled that the files "had nothing to do with the fee dispute or the counter-claim." Chanin holds Parnar's files hostage to prevent her from uncovering the full extent of the fraud perpetrated against her.

Chanin has a history of not returning files as the Court was informed by Parnar. RA-III, at 119, 120, 124, 142, 143. Moreover, failure to promptly deliver to a client property to which the client is entitled is a violation of Disciplinary Rule 1.15(b), HRPC.

Chanin claims "[a]fter an extensive search of all on [sic] Chanin's storage facilities it became evident that Chanin did not have possession of the requested files." AB at 5. On February 2, 1995, Chanin told Parnar and Judge Huddy, a year after he was asked for Parnar's files, that he would look in another warehouse for them. 2/2/95 Tr. at 8-9. Chanin's subsequent motion for sanctions said nothing about the files. *See* AB, Appendix A. At the next and final hearing before Judge Huddy, Chanin said nothing about files. *See* 4/19/95 Tr. at 1-10. Nowhere in the record does Chanin state he checked all his storage sites and found no files.

Suppression of documents constitutes fraud upon the court in and of itself. *Demjanjuk v. Petrovsky, et al.*, 10 F.3d 338, 354 (6th Cir. 1993). Chanin's suppression and concealing of the files that he had a duty to disclose, to thwart Parnar's ability to mount a defense, violated her right to a fair hearing, and is a fraud upon the court.

Chanin provides that "[t]he judgment amount actually granted reflected the amount justified to the prevailing party under the circumstance." AB at 8. This statement is rendered false by the record and Chanin's invoicing. RA-I at 203-251; RA-III at 45, 46, 111-115, 208, 209; RA IV at 34, 89-106. The Chanin sworn Affidavit attached as Exhibit B to the Judgment entered January 11, 1996, RA-III at 5, falsely states that the final invoice received by Parnar was on February 5, 1991, and is contradicted by RA-I at 251, RA-IV at 99-104. The Affidavit also states that the principal amount due and owing is $24,431.88, which is contradicted by RA-IV at 34, 89-106.

Chanin, AB at 6, refers this Court to the decision of May 24, 1996. That referenced decision reads at para. 7, pages 2, 3, RA-III at 212, 213:

> In September of 1993, Judge Melvin Soong after a hearing on Plaintiff's Motion to Compel, ordered Defendant Parnar to resume her deposition; however, before the Order could be entered, defendant Parnar filed her objections to the proposed Order and continued to refuse to cooperate in making arrangements for the taking of her deposition;

This is a total fabrication. Parnar could file no objections. No proposed order ever existed--because Judge Soong never held any hearing in *Chanin v. Parnar*, whatsoever, as evidenced by the record. False statements and fabrication of evidence perpetrated by an officer of the court as rendered throughout the record herein are fraud upon the court. OB at 13, 14.

Other falsehoods and misrepresentations in Chanin's Answering Brief are too numerous for detailed response herein, and are not supported by the record.

II. ARGUMENT

A. THIS COURT SHOULD ACCEPT AS TRUE THE STATEMENT OF FACTS IN PARNAR'S OPENING BRIEF NOW UNCONTROVERTED AND GRANT RELIEF FOR FRAUD UPON THE COURT, FRAUD, AND CONFLICTS OF INTEREST UNDER THIS COURT'S INHERENT AND PLENARY POWER.

Chanin's "Answer" is replete with argument and comment without citation to record, transcript, rule, or authority as required by Rule 28, Hawaii Rules of Appellate Procedure ("HRAP").[2] His brief consists of anecdotes outside and inconsistent with the record on appeal. He offers no authority, no statement of the case, no conclusion, no standards of review, and no refutation to the conflicts of interest, fraud upon the court, and countless accusations of fraud in the Opening Brief. This failure to refute the arguments in the Opening Brief constitutes an admission of the points argued by Parnar.[3] Accordingly, when fraud on the court has been established, this court has inherent and

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[2] Rule 28(c), HRAP requires the answering brief to ". . . be of like character as that required of appellant except that no statement of points shall be required, and no other section is required unless the section presented by the appellant is controverted." Chanin's Answering Brief fails in any semblance of "like character" as it fails to cite the record or any authorities, nor recite a conclusion. In *Hong v. Hong*, 67 Haw. 15, 675 P.2d 679 (1989) the court provided that sanctions, including dismissal, would be levied in cases of substantial non-compliance with appellate rules. Rule 30, HRAP provides that the brief by an appellee not timely filed is not in conformity with HRAP, may be stricken, sanctions levied, and the statement of facts in appellant's opening brief accepted as true. Rule 51, HRAP, also permits sanctions for failure to comply with the rules.

[3] Failure to reply to an issue is tantamount to a confession that opposing party's position was correct. *Trammell v. State*, 622 So.2d 1257, 1261 (Miss. 1993); When an appellee fails to address the issues raised by appellant, the judgment below is subject to reversal. *Laux v. Chopin Land Associates, Inc.*, 615 N.E.2d 902 (Ind.App.1993); Failure to respond to an issue raised by an appellant is akin to failure to file a brief, and subjects appellee to reversal and waives the issues. *Hacker v. Holland*, 575 N.E.2d 675 (Ind. App. 1 Dis. 1991); Arguments inadequately presented on appeal are waived. *Eckiss v. McVaigh*, 261 Ill. App. 3d 779, 634 N.E.2d 476 (Ill App. 1994).

plenary power to grant appropriate relief. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S.Ct,997, 88 L.Ed 1250 (1944).

Even though this court has only appellate jurisdiction, it has the power to grant relief both where the facts are admitted, and where a trial of the facts is necessary, it properly acts as trier of the facts and judge of the law. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed 1447 (1946); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (3d. Cir. 1948), cert. denied 335 U.S. 912, 69 S Ct 481, 93 L Ed 444. (1949). *Moore's Federal Practice*, vol.7, section 60.33 at 60-352, 60-353 (1982).

> . . . No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever may have been the merits of his claim. *Root*, supra. at 534, 535.

If fraud upon the court is found, the judgment must be vacated and the guilty party denied all relief whatever the merits of his claim. 57 Am Jur, 2d § 895, *Root*, supra.; and see *Hazel-Atlas Glass*, supra.

Where a default judgment is the result of fraud on the court it is void and must be set aside as a nullity. *Trehan v. Von Tarkanyi*, 85 B.R. 920, 921, 933 (S.D.N.Y. 1988). Relief from void judgments is not discretionary, it is mandatory. *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994).

Moreover, "Fraud vitiates all agreements as between the parties affected by it." *Peine v. Murphy*, 377 P.2d 708, 712 (Haw. 1962). Because Chanin misled as to the conflict of interest and fraud upon the court, his oral fee agreement with Parnar was void *ab initio*. *Id.* at 798. Fraud vitiates every agreement. *Cummins v. Cummins*, 24 Haw. 116, 121 (1917).

> "Where a party intentionally or by design misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud in the truest sense of the term'" 1 Story, Eq. Jur., p. 189. *Id.* at 121.

The Hawaii Supreme Court has recognized that where the execution of a contract is obtained by fraud, deceit, or misrepresentation, the contract may be avoided by the party who was mislead. *Island Directory Co. v. Iva's Kinimaka Enterprises, Inc.*, 859 P.2d 935, 936, 941 (Haw. App. 1993).

Chanin discusses his representation of Parnar in her fee dispute with Attorney Lilly in *Americana*, AB at 1-2, but fails to refute the conflict of interest established herein and in the Opening Brief pages 15 and 16.

Chanin, no stranger to conflict of interest, has a history of disregarding conflict of interest principles as evidenced by the following cases in which he was denied fees: *In Re South Pacific Island Airways*, 68 B.R. 574, 576, 578 (Bkrtcy.D.Hawaii 1986) (Chanin denied all fees); *In Re Charley's Tour and Transportation, Inc., United States of America v. John A. Chanin*, 133 B.R. 237, 240, 241 (Bkrtcy.D.Hawaii 1991) (Chanin's fee applications were denied); *In Re WPMK, Inc.*, 42 B.R. 157, 163

(Bkrtcy.D.Hawaii 1984) (Chanin's petition for compensation for services rendered and reimbursement of expenses denied, Chanin ordered to return all fees previously paid).

Courts have denied fees in other cases involving conflict of interest: *In Re 765 Associates*, 14 B.R. 449 (Bkrtcy.D.Hawaii 1981) (application for compensation denied and all fees previously paid ordered returned); *In Re Maui 14K, Ltd.*, 133 B.R. 657, 661 (Bkrtcy.D.Hawaii 1991) (granted Motion for Disgorgement and ordered all funds received repaid, including the retainer, because the attorney failed to disclose his relationship. In addition, the attorney failed to disclose previous payment)[4]; *In Re Chou-Chen Chemicals, Inc.*, 31 B.R. 842, 849 (Bkrtcy. W.D. Kentucky 1983) (attorney fees were entirely disallowed on the ground of conflict of interest); *In Re Paine*, 14 B.R. 272, 274 (W.D. Mich. 1981) (cancellation of all fees was nothing more than a penalty for violation of the Code of Professional Responsibility).

Accordingly, the established and uncontroverted fraud on the court, fraud, and conflicts of interest should be accepted as true, and this Court should void and vacate the judgment, and grant the relief requested by Parnar.

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[4] Chanin failed to make disclosure and to notify the Court when Chanin paid himself $520.02, out of Parnar's trust account after the Complaint was filed. RA-I at 248, RA-IV at 351, 363.

B. CHANIN CONTINUES TO REFUSE TO SHOW WHY HE FAILED TO TIMELY FILE THE ANSWERING BRIEF OR TIMELY FILE FOR EXTENSION, AND RELIEF AND SANCTIONS MUST BE GRANTED.

On July 30, 1997, this Court ordered Chanin to show cause why he failed to timely file an answering brief, or failed to timely request an extension. Chanin finally paid the $25 fine and $50 fine based on sanctions orders. However, he still refused to show cause why he failed to timely file an answering brief. The $25 fine and $50 fine are meaningless. This is just one more act in a continuous course of contumacious conduct involving his refusal to submit orders, comply with the rules and disregard of court orders and procedures. Willful violations of the rules warrant severe sanctions.

Rule 51, HRAP, provides:

> Any attorney of record in a case, who fails to comply with any of the provisions of these rules shall be subject to sanctions, by fine or otherwise, by the appellate court before which such case is pending, such sanctions to be levied by order of the court or by order of any judge or justice thereof.

Pursuant to the Rules, the Constitution, and the laws of Hawaii, the Supreme Court has inherent and plenary power to afford relief and sanctions for attorneys who perpetrate fraud upon the court, employ abusive litigation practices, and ignore the Court's rules, notices, and principles as demonstrated.

Parnar requests the following relief and sanctions be granted for Chanin's willful violation of the Rules, fraud upon the court, and conflict of interest principles:

1. Deem Parnar's statement of facts as true and correct pursuant to Rule 30, HRAP.

2. Void and vacate the judgment for fraud upon the court and conflicts of interest; render default against Chanin; order reimbursement of attorneys' fees, costs, and expenses, and any and all other appropriate relief, plus interest under Unfair and Deceptive Acts and Practices.

3. Order default against Chanin on Parnar's counterclaim due to fraud upon the court and conflict of interest and remand for a jury trial as to the damages.

4. Order return of all money taken by Chanin from Parnar's trust account, plus interest due to conflicts of interest and fraud, with all Chanin associates at the time held jointly and severally liable.

5. Void and vacate the evidentiary hearing order in Civil No. 52878, *Eugenie Parnar v. Americana Hotels, et al.*, due to fraud upon the court and conflicts of interest. Conflicts of interest rendered a void order, procured by fraud; order reimbursement of principal, attorneys' fees, costs, and expenses with interest under Unfair and Deceptive Acts and Practices, and any and all other appropriate relief, with all parties jointly and severally liable.

6. Order reimbursement by Chanin and his associates at the time of the amount he advised Parnar to pay Schutter, plus interest, under Unfair and Deceptive Acts and Practices due to conflict of interest and fraud.

7. Order Chanin return to Parnar all of her files in this case, Civil No. 90-1843 and Civil No. 52878.

8. Order Parnar's money held in court in lieu of appeal bond returned with interest.

9. Order the Notice of Lien that Chanin filed against Parnar in Civil No. 52878, *Eugenie Parnar vs. Americana Hotels, et al.*, filed January 30, 1991, expunged due to fraud upon the court and conflicts of interest.

10. Order expungement of recordation of judgment at the Bureau of Conveyances.

11. Order emotional distress and punitive damages.

12. Order prejudgment interest

Intentional employment of unreasonable means of collection give rise to mental and emotional distress damages. *Chedester v. Stecker*, 643 P.2d 533 (Haw. S.Ct. 1982). Under Hawaii law, willful or reckless conduct as to breach of contract allows for emotional distress damages. Wanton, oppressive, or malicious conduct can justify the imposition of punitive damages. *Genovia v. Jackson National Life Ins. Co.*, 795 F.Supp. 1036, 1037, 1043 (D.Hawaii 1992); *Glover v. Fong*, 40 Haw. 503, 511 (1953).

The Hawaii Supreme Court in *The Best Place, Inc. v. Penn America Insurance Company*, 920 P.2d 334, 347 (Haw. 1996) stated as to punitive damages:

> Such damages may be awarded in cases where the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; or where there has been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.

"Where a persons's property is not returned for a period of time, due to the malice of the person in charge of the property, punitive damages, as well as actual damages, are allowable against that person." *Lane v. Yamamoto*, 628 P.2d 634, 636 (Haw. App. 1981).

Parnar became another victim of Chanin because no one had stopped him. Chanin has been involved in numerous lawsuits. RA-III at 120, 125, 151-155.

> Most of these are cases over again the 30-some odd year period where I've sued clients for fees. Tr. 1/31/96 at 8.

This Court is requested to take judicial notice of additional Chanin lawsuits since Parnar brought this to the Court's attention. RA-IV at 4-6.

III. CONCLUSION

Clear and undisputable flagrant and manifest abuse of individual rights inconsistent with Constitutional guarantees

and the administration of justice are before this Court as to this litigant. Appellant requests she be granted the relief and sanctions as requested herein, and any and all further appropriate relief.

DATED: Honolulu, Hawaii, September 22, 1997.

/s/ EUGENIE PARNAR
EUGENIE PARNAR
Defendant-Appellant and
Counterclaimant Pro se

Appendix XI
–Petitioner's Memorandum In Opposition
to Respondent's Motion for Sanctions

EUGENIE PARNAR
252 Paoa Place, #3-3
Honolulu, Hawaii 96815
Telephone: (808)955-5050
Defendant-Counterclaimant
Pro se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff,

vs.

EUGENIE PARNAR,
Defendant.

Civil No. 90-1843-06
(CONTRACT)

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[Clerk]

DEFENDANT EUGENIE PARNAR'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER IMPOSING SANCTIONS UPON DEFENDANT EUGENIE PARNAR FOR FAILURE TO SUBMIT TO THE TAKING OF HER DEPOSITION, FILED MARCH 24, 1995; AFFIDAVIT OF EUGENIE PARNAR; EXHIBITS "A" - "E"; CERTIFICATE OF SERVICE

Date: April 19, 1995
Time: 10:30 a.m.
Judge: The Honorable Wendall K. Huddy
Trial Date: December 18, 1995

DEFENDANT EUGENIE PARNAR'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER IMPOSING SANCTIONS UPON DEFENDANT EUGENIE PARNAR FOR FAILURE TO SUBMIT TO THE TAKING OF HER DEPOSITION, FILED MARCH 24, 1995

COMES NOW Defendant Eugenie Parnar *pro se*, and in opposition to Plaintiff's Motion for an Order Imposing Sanctions Upon Defendant Eugenie Parnar for Failure to Submit to the Taking of Her Deposition, Filed March 24, 1995, submits the following based on the entire records and files of this case and the Affidavit of Eugenie Parnar and the attached Exhibits:

I. BACKGROUND

Plaintiff is seeking an order from this Court imposing unspecified sanctions against Defendant under Rule 37 of the Hawaii Rules of Civil Procedure ("HRCP") in an attempt to try to thwart Defendant's statutory, procedural due process,

and constitutional rights, and to deny Defendant her constitutional right of access to the courts and a trial on the merits. As will be demonstrated, Plaintiff has engaged in unfair and inequitable conduct by disregarding Rule 23 of the Hawaii Rules of the Circuit Courts ("HRCC") by failing to submit proposed orders; by refusing to return Defendant's files to her; by failing to meet the requirements of Rule 37, HRCP; using the deposition as an intimidation tactic when Defendant is without counsel to gain unfair advantage; and denying her legitimate procedural due process and constitutional rights in violation of court rules and state and federal constitutions. Defendant submits that Plaintiff is not entitled to any sanctions and certainly not dismissal of her counterclaim, based on the law and special circumstances of this case. Plaintiff himself has engaged in conduct which precludes him from obtaining sanctions.

On January 31, 1995, Defendant filed objections to Plaintiff's notice of taking her deposition and subpoena duces tecum, and a Motion for Protective Order to protect her from Plaintiff's discovery tactics. Defendant obtained an order shortening time for hearing. The hearing was held on February 2, 1995, at which time the Court orally denied in part and granted in part her Motion. Entry of a written order pursuant to Rule 23, HRCC is still pending even though both parties have submitted proposed written orders. On February 24, 1995, Defendant filed a motion for rehearing of the Court's February 2, 1995 oral decision on her Motion for Protective Order. Plaintiff has submitted a proposed order denying the rehearing and Defendant has submitted objections to Plaintiff's proposed order. Entry of the written order is still pending.

Without waiting for the written orders to be entered by the Court, Plaintiff filed the notice of Defendant's deposition on

March 20, 1995, but a filed-stamped copy was not mailed until March 21, 1995 (See attached Exhibit "E"), which arrived after the time for the noticed deposition. This in itself is an abuse of fair deposition procedures and was untimely, improper notice. (See Parnar affidavit ¶ 15)

By hand delivery Plaintiff was timely notified through Defendant's letter of March 21, 1995, with copy to the court, and herein included as Exhibit "D", that she could not attend the March 22, 1995, deposition, that she intended to timely avail herself of appropriate procedures to pursue an appeal as to constitutional violations and deprivations based upon the *Hawaii Rules of Civil Procedure, Hawaii Rules of the Circuit Courts,* the *Constitution of the State of Hawaii*, and the *Constitution of the United States;* and that she was without counsel, and needed counsel to protect her from Plaintiff's tactics. Forcing Defendant to submit to a deposition by Plaintiff without counsel would seriously jeopardize her case and affect her right to a fair trial on the merits. Moreover, Defendant has a right to entry of written orders concerning her Motion for Protective Order and motion for rehearing. Further, Defendant needs her files which Plaintiff is refusing to turn over to her, in order to prepare for trial and any deposition. Plaintiff's refusal to turn over Defendant's files will substantially and irreparably injure Defendant's case as they are the main files evidencing Plaintiff's conduct constituting the heart of Defendant's counterclaim.

Plaintiff's motion disregards Defendant's right to entry of an order from which she may seek appellate review as provided by law to protect her rights. Plaintiff was notified of Defendant's intention to appeal in her letter to Plaintiff of March 21, 1995, from the granting in part and denying in

part of her Motion for Protective Order and that Defendant was without counsel. Clearly, Defendant has a basis to seek appellate review. Based on *Chuck v. St. Paul Fire and Marine Ins. Co.*, 606 P.2d 1320, 1321 (Hawaii 1980), a party "though precluded from a direct appeal, may seek an interlocutory appeal at the trial court's discretion or, alternatively, may petition the appellate court for a writ of mandamus." Similarly to the present action, in *Chuck,* the party "had been unable to obtain substitute counsel" and had been forced to represent himself, which was a circumstance considered justifiable in the Hawaii Supreme Court granting petition for writ of mandamus directing that that order of disqualification of the attorney be put aside. "Under the collateral order, certain collateral orders may be final for the purposes of appellate review if they finally determine claims of right too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Chuck,* 606 P.2d at 1321. Here, forcing Defendant to a deposition without counsel, given the abusive tactics of Plaintiff, would so seriously jeopardize her case and cause immediate and irreparable harm and thus is so compelling and important as to warrant appellate review at this point in time and not defer until the whole case is adjudicated.

Generally an appeal in civil cases may be taken as a matter of right only from a final judgment, order or decree of the trial court. HRS § 641-1. Such judgment, order or decree, however, need not be the last decision in the case, nor is it necessary that it conclude all rights that are the subject of the litigation. The nature or effect of the order determines finality. *In re Application of Castle,* 54 Haw. 276, 506 P.2d 1, 3 (1973). Here, forcing Defendant to a deposition alone

without counsel given Plaintiff's tactics, would so irreparably harm her case as to be tantamount to a final disposition of her case. Included in this category are certain collateral orders affecting rights which are independent of, and separable from, the rights asserted in the main action. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In *Cohen,* the Supreme Court had before it a district court order denying the defendant-appellee's motion to compel the plaintiff-appellant to post security as a condition to his action. In holding the order to be final for the purposes of appellate review, the Court said:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen* 337 U.S. at 546, 69 S.Ct. at 1225- 26.

Alternatively referred to as the "collateral order doctrine," the *Cohen* rule has been applied in cases of attorney disqualification. Thus federal courts have consistently held that orders granting motions for disqualification are immediately appealable under the rule. See, e.g., *Aetna Cas. & Sur. Co. v. United States,* 570 F.2d 1197 (4th Cir. 1978); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976); *Hull v. Celanese Corp.*, 513 F.2d 568 (2nd Cir. 1975); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (3rd Cir. 1972). And while there exists some disagreement over its applicability to orders denying disqualification, compare, e.g., *Community Broadcasting of Boston, Inc. v. F. C. C.*, 178 U.S. App. D.C. 256, 546 F.2d 1022 (D.C. Cir. 1976) with *Silver Chrysler Plymouth, Inc. v. Chrysler*

Motors Corp., 496 F.2d 800 (2d Cir. 1974), a large number of cases appear to hold that both types of orders are immediately appealable under the *Cohen* rule. 15 Wright, Miller & Cooper, Federal practice and Procedure: Jurisdiction § 3911, at 490 (1976). The rationale for these holdings essentially is that the "rights to be represented by chosen counsel, or not to be opposed by disqualified counsel, are incapable of effective preservation after trial, even if a second trial should be awarded." *Chuck,* supra, p. 1323. It would appear that matters relating to legal representation, or lack of it, are properly appealable matters.

Being forced by court order to a deposition with Mr. Chanin alone without counsel under the special circumstances of this case and Mr. Chanin's historic conduct would severely jeopardize, cause irretrievable harm, and is tantamount to destroying Defendant's case. Her rights would be irretrievably lost and her right to seek appellate review jeopardized. Orders such as this, Defendant contends, falling within the *Cohen* collateral order doctrine may not be effectively reviewable and rights may be lost, perhaps irretrievably, if review awaited a final judgment. *Ass'n. of Owners v. Swinerton & Walberg Co.*, 705 P.2d 28, 34 (Hawaii 1985) citing *Cohen* supra.

Chuck, supra, p. 1321, not only recognized "the importance of a party's right to be represented by his chosen counsel," but also recognized the party being without counsel may move the trial court for leave to take an interlocutory appeal under HRS § 641-1.

As in the *Chuck* action, p. 1325, where the refusal "would work a substantial hardship on the client because of the distinctive value of the lawyer" necessary to protect her

rights, the denial of which would cause Defendant "immediate and irreparable harm justifying granting petition for writ of mandamus directing that the disqualification order be set aside," here denying Defendant, who is without counsel, a protective order to protect her from the abusive deposition tactics of Plaintiff would cause "immediate and irreparable harm" justifying appellate relief.

Plaintiff's ulterior purpose is to subvert legitimate discovery through harassment and intimidation. As in *Hapgood v. Bilexi Regional Medical Center,* 540 So. 2d 630 (Miss. 1989), which held that dismissal of a claim under Rule 37, Miss. R. Civ. Pro. was improper, unique and extenuating circumstances are also present in the instant case before the Court. Defendant is without counsel and Plaintiff is attempting to take advantage of that. Also, Plaintiff has refused to turn Defendant's files over to her and preparation for discovery and trial is substantially prejudiced. (Parnar Affidavit, ¶ 16).

Defendant was forced to terminate her prior counsel due to his failure to prepare for trial. Upon terminating him, Defendant learned he had not even done discovery as basic as requesting and retrieving Defendant's files from other prior counsel here and on the mainland. Defendant further ascertained from court minutes, attached as Exhibit "B", that he had failed to appear for a hearing and thus had not been representing her properly. This further substantiates that Defendant was justified in seeking other counsel. (Parnar Affidavit ¶ 7)

Defendant has made good faith efforts to obtain counsel by contacting over 70 lawyers. Some lawyers took what files she had and sat on them for prolonged periods. One held her

files for almost two months before declining to take her case. Only recently an attorney had held her case for more than 10 days and failed to take her case. Accordingly, Defendant had to retrieve her files and has placed an ad for an attorney in the Honolulu Advertiser and Star Bulletin newspapers. The ad will run on the following dates: April 12, 13, 14, 15, 16, 17, 18, 1995. A copy of the ad is attached hereto as Exhibit "C". In addition, Defendant has placed an ad for an attorney in the Hawaii Bar Journal which will appear in the May issue. Defendant is doing everything she possibly can to obtain counsel for this case. Defendant is not disregarding the system, the system is disregarding her. (Parnar Affidavit ¶ 9)

Based on her past experience with Plaintiff and especially his offensive and abusive behavior to her when she responded to his subpoena duces tecum on March 3, 1995, where he was insulting, intimidating and ultimately told her to "get out" of his office, she cannot submit to a deposition by him alone without counsel to protect her from such inappropriate conduct. Further, counsel is necessary during the deposition so that any rights to work product, confidentiality, privilege, or privacy are not unknowingly waived.

II. ARGUMENT

A. PLAINTIFF IS PROCEEDING IN BAD FAITH "WITHOUT CLEAN HANDS" AND HIS MOTION THEREFORE SHOULD BE DENIED.

Plaintiff has Defendant at a severe disadvantage. Plaintiff is a lawyer, Defendant has no legal training. At one time,

Plaintiff was Defendant's attorney and thus gained a special advantage over her which he is now trying to exploit when she is without counsel.

Defendant notified Plaintiff of her intent to appeal the decision on her Motion for Protective Order due to constitutional violations and deprivations in being forced to a deposition without an attorney. A request for appellate relief cannot be subverted by sanctions and dismissal. The Court must examine the reasons for the reluctance to submit to the second deposition. *Hapgood,* Supra, p. 634. Further, it must be noted that Defendant is not refusing to submit to discovery because on March 3, 1995, Defendant complied with Plaintiff's subpoena duces tecum by personally delivering to Plaintiff in his office all the files and records she had. To dismiss her counterclaim under these unique and extenuating circumstances is tantamount to being punitive and denies Defendant her constitutional right to a trial on the merits.

It must be noted that Plaintiff had the opportunity to conduct the second deposition when Defendant had counsel, and his "unfair conduct" should thus preclude him from obtaining the sanctions he is requesting in his Motion. (Reference letter to Plaintiff dated May 5, 1992, making Defendant available for deposition on certain dates, attached hereto as Exhibit "A", and Parnar Affidavit ¶ 10) But Plaintiff failed or refused to do so. Now Plaintiff in bad faith is trying to take advantage of Defendant by trying to force the taking of her deposition when she is without counsel. Further, the record reveals that Plaintiff has failed to comply with Rule 23, HRCC by failing or refusing to submit orders, particularly Judge Klien's order establishing parameters for Defendant's deposition and giving instructions to Plaintiff.

Thus, Plaintiff himself has not acted equitably and is, therefore, not entitled to invoke the equitable power of the Court and his motion for sanctions should be denied.

B. PLAINTIFF IS BARRED FROM RELIEF UNDER RULE 37, HRCP, BECAUSE HE HAS NOT MET THE APPLICABLE LEGAL TESTS.

Rule 37 requires that two tests be satisfied: first, that there be a valid order to compel and second, that a party's refusal to take a deposition be absolute. As for the first test, the parties are awaiting entry of several orders in this case pursuant to Rule 23, HRCC, in which parameters on the taking of Defendant's deposition were ordered by Judge Klien and Judge Huddy's written decision on Defendant's Motion for Protective Order and motion for rehearing. Defendant has submitted a proposed order on her Motion for Protective Order and has a right to written orders entered by the Court. If the Court adopts her proposed order it would be more restrictive than Plaintiff's proposed order and that is very important to any deposition to which Defendant is subjected and from which to seek appellate relief. Defendant was under no written order of the Court compelling her to attend the deposition.

Plaintiff has failed to meet the second test of Rule 37, HRCP which requires that a party's refusal to have the party's deposition be absolute. Rule 37 is unripe unless the failure to make discovery is absolute. *R.W. Int'l Corp. v. Welsh Foods, Inc.*, 937 F.2d 11 (1st Cir. 1991). In the instant case it is not absolute because Defendant gave a deposition when she had counsel and complied with Plaintiff's subpoena duces tecum on March 3, 1995. Defendant now has indicated she desires to seek appellate review of the decision on her Motion for

Protective Order and being forced to a deposition without counsel. Dismissal of a party's claims is not warranted if a party has a legitimate reason for not appearing for court ordered deposition. *Zises v. Department of Social Services of the Human Resources Administration of the City of New York,* 112 F.R.D. 223, 227 (E.D.NY. 1986). Here Defendant declined to appear for her deposition and gave Plaintiff written notice (Exhibit "D"). In *Gocolay v. New Mexico Federal Savings and Loan Ass 'n.,* 968 F.2d 1017 (10th Cir. 1992), the Tenth Circuit reversed the dismissal of the complaint pursuant to Rule 37 because of the party deponent's ill health and stated, page 1022, that the "trial court [should] not only encourage appropriate discovery, but must equally discourage abusive discovery." Further, the harsh sanctions of dismissal should be imposed only if the element of prejudice is present *Wanderer v. Johnston,* 910 F.2d 652 (9th Cir. 1990), or only if a party engaged in "wilfulness, bad faith or fault." *Patterson v. Coca Cola Bottling Co.,* 852 F.2d 280 (7th Cir. 1988). Here Plaintiff cannot show prejudice and Defendant is not engaged in wilfulness, bad faith or fault. See also *ME.N. Co. v. Control Fluidics, Inc.,* 834 F.2d 869 (10th Cir. 1987), where the court in reversing a Rule 37 dismissal stated, p. 873, that "[i]f the fault lies with the attorneys, that is where the impact of the sanction should be lodged." In *Badalamenti v. Dunham's, Inc.,* 896 F.2d 1359, 1363 (Fed. Cir. 1990), the Court held that a refusal to provide discovery based on alleged confidentiality did not warrant sanctions and the sanctions award was reversed.

Here, Defendant Parnar objected (See Exhibit "D") to the Notice of Deposition because she needed an attorney to protect her rights relating to privilege, confidentiality, privacy, and freedom from abusive and intimidating

deposition tactics by Plaintiff. The incident in Plaintiff's office involving Plaintiff being abusive when Defendant responded to the Subpoena Duces Tecum on March 3, 1995 is a sufficient basis for Defendant "to realize" that she cannot go into a deposition alone against the Plaintiff. See Parnar Affidavit, ¶ 12. She did not refuse "willfully," in "bad faith," nor "fault" to the deposition. Her reluctance is not absolute. She complied with the first deposition when she had counsel, she complied with the Subpoena Duces Tecum, but she cannot go into a deposition with Plaintiff alone without counsel. To impose the sanctions Plaintiff requests would be a grave miscarriage of justice and violate fundamental due process. Constitutional due process concerns arise from a strong policy favoring trial on the merits. *In Re Barnholdt,* 74 B.R. 760, 764 (Bktcy N.D.N.Y. 1987). Plaintiff has failed to satisfy Rule 37, HRCP, for the drastic sanction of dismissal and his motion for sanctions must be denied.

C. PLAINTIFF'S MOTION IS SOLELY PUNITIVE AND MUST BE DENIED.

The parties are awaiting the entry of certain orders of the court, orders from which Defendant may seek appellate review. Plaintiff's motion smacks of being reactive, punitive, and a "pre-emptive strike." Therefore, his motion for sanctions must be denied.

D. LEVYING OF SANCTIONS REQUESTED BY PLAINTIFF WOULD VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS.

Clearly, any sanction involving dismissal of Defendant's counterclaim is a very drastic remedy. Rule 37, HRCP, must be read in light of the Fifth Amendment that no person

should be deprived of property without due process of law...." *Societe Internationale v. Rogers,* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255, 1265 (1958). There are constitutional limits on the power of courts to dismiss an action without giving a party the opportunity for a hearing on the merits of her case. Plaintiff is requesting this Court to breach those limits and accordingly, his motion for sanctions must be denied. Dismissal is too "draconian," too drastic, and not warranted under the special, unique and extenuating circumstances of this case.

E. SANCTIONS OF DISMISSAL OF DEFENDANT'S COUNTERCLAIM MAY VIOLATE DEFENDANT'S RIGHT TO SEEK APPELLATE REVIEW.

Defendant is awaiting the entry by the Court of its Order Granting In Part and Denying in Part her Motion for Protective Order. Defendant has explained in her letter to Plaintiff dated March 21, 1995, Exhibit "D", that she intends to seek appellate review. Plaintiff filed his Motion for Sanctions three days later as a "pre-emptive strike" rather than wait until the Court's order was entered. By doing so, he seeks to thwart Defendant's attempt to obtain appellate review of the decision on her Motion for Protective Order. Accordingly, his motion for sanctions should be denied.

III. CONCLUSION

Plaintiff's motion for sanctions against Defendant under Rule 37, HRCP is an attempt to thwart Defendant's statutory, procedural due process, and constitutional rights, and to deny Defendant her constitutional right of access to the courts, appellate review, and a trial on the merits. Plaintiff himself has engaged in unfair and inequitable conduct by

disregarding Rule 23, HRCC by failing to submit proposed orders; by refusing to return Defendant's files to her so that Defendant's preparation for deposition and trial is jeopardized; by failing to meet the requirements of Rule 37, HRCP; using the deposition as an intimidation tactic when Defendant is without counsel to try to gain unfair advantage; and denying her legitimate procedural due process and constitutional rights in violation of court rules and state and federal constitutions. Plaintiff is not requesting specific sanctions, but sanctions under Rule 37 generally. Defendant submits that Plaintiff is not entitled to any sanctions and certainly not dismissal of her counterclaim, based on the law and special circumstances of this case. Plaintiff himself has engaged in unfair and inequitable conduct which precludes him from obtaining sanctions. Plaintiff is intentionally using procedures to abuse the judicial process to gain an unfair advantage over Defendant. Dismissal of Defendant's counterclaim would be denial of her right to a hearing on the merits in this case and would violate her fundamental constitutional rights.

DATED: Honolulu, Hawaii, April 17, 1995.

/s/ EUGENIE PARNAR
Defendant-Counterclaimant
Pro Se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THE LAW OFFICES OF
JOHN A. CHANIN,
Plaintiff,

vs.

EUGENIE PARNAR,
Defendant.

Civil No. 90-1843-06
(CONTRACT)

AFFIDAVIT OF EUGENIE PARNAR
EXHIBITS "A" - "E"

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

Affiant Eugenie Parnar, being first duly sworn under oath, deposes and says:

1. I am the Defendant and Counterclaimant in the above-entitled matter.

2. I am not an attorney licensed to practice law in the State of Hawaii, or anywhere; I am without counsel; am

seeking counsel; and am forced to appear *pro se* in this matter.

3. I make this Affidavit on personal knowledge and am competent to testify to the matters and facts stated herein.

4. I dispute all his allegations in his motion, memorandum and affidavit as distortions of the truth.

5. On December 4, 1991, I had counsel and submitted to my deposition by Plaintiff, during which time he posed irrelevant questions and Plaintiff, not I, stopped the deposition by announcing that he had to catch a flight to the mainland at noon that day.

6. I filed a Motion to Terminate Deposition which was denied, but parameters were established and instructions issued by Judge Klien to Plaintiff. Plaintiff refused to submit Judge Klien's order in violation of Rule 23, Hawaii Rules of the Circuit Courts.

7. I was forced to terminate my prior counsel due to his failure to prepare for trial. Upon terminating him, I learned that he had not even done discovery as basic as requesting and retrieving any files from other prior counsel here and on the mainland. I further ascertained from Court minutes (attached as Exhibit "B"), that he had failed to appear for a hearing and thus had not been representing me properly and in my best interests. This further substantiates that I was justified in seeking other counsel.

8. Since then, I have been diligently seeking to obtain counsel. I have contacted over seventy (70) attorneys. Some have held my case files for months before declining to

represent me; some indicated that they don't take legal malpractice cases; some indicated that they had a conflict; and some failed to respond at all. I continue to search for counsel.

9. In furtherance of my pursuit in seeking counsel, I placed newspaper ads in the Honolulu Advertiser and the Star Bulletin which are scheduled to run April 12, 13, 14, 15, 16, 17, 18, 1995. A copy of the April 12, 1995, ad in the Honolulu Star Bulletin is attached hereto as Exhibit "C". A similar ad now placed in the Hawaii Bar Journal will be published in the May, 1995, issue.

10. Contrary to Plaintiff's false allegations, I have not "made over-all refusal to abide by the orders of the Court and the rules related to discovery et al." Not only has my deposition been taken, but when I had counsel, counsel offered to schedule the deposition on certain specific dates pursuant to his May 5, 1992 letter. (attached as Exhibit "A") Plaintiff refused to avail himself of those dates and schedule a second deposition and now, when I am without counsel, Plaintiff is seeking to take advantage of me by trying to force me into a deposition. I did comply with Plaintiff's Subpoena duces Tecum by personally delivering all my files and records to Plaintiff on March 3, 1995. This clearly demonstrates that I have permitted and participated in discovery and am trying to obtain counsel to continue.

11. Contrary to Plaintiff's allegations that I have made frivolous excuses and arguments, I have adhered to procedure as required and prescribed by the Hawaii Rules of the Circuit Courts and the Hawaii Rules of Civil Procedure. Plaintiff, however, continuously refused to implement proper procedure for submission of proposed orders as provided and

required by law whenever he disliked rulings unfavorable to him such as Judge Klien's order.

12. When I showed up at Plaintiff's office on March 3, 1995, for the Subpoena Duces Tecum, Plaintiff was abusive, clearly trying to intimidate me by rude, insulting, and accusative behavior, accusing me of untruths and of having some emotional overlay that I was playing with, taunting me as to whether I was going to show up for the deposition, and ultimately kicked me out of his office telling me "get out of here."

13. I need an attorney to protect my rights during a deposition including my rights to privilege, work product, confidentiality, and privacy. My case will be severely and irreparably harmed to the extent that my due process rights to a fair trial will be violated, if I am forced to go into a deposition with Plaintiff alone without counsel.

14. Plaintiff was notified through my letter of March 21, 1995, with a copy to the Court, Attached Exhibit "D," of my intent to timely avail myself of appropriate procedures to pursue an appeal on the Court's denial in part and granting in part my Motion for Protective Order as to constitutional violations and deprivations, based upon the *Hawaii Rules of Civil Procedure, Hawaii Rules of the Circuit Courts,* the *Constitution of the State of Hawaii,* and the *Constitution of the United States.* Plaintiff then quickly filed his Motion for Sanctions as a "pre-emptive strike" without waiting until the Court entered its written order on my Motion for Protective Order.

15. Plaintiff filed the notice of Defendant's deposition on March 20, 1995, but a file-stamped copy was not mailed

to me until March 21, 1995, which arrived after the time of the noticed deposition. A copy of the envelope is attached hereto as Exhibit "E". I assert that this is untimely and improper notice.

16. I have asked Plaintiff for my files and he has refused to turn them over to me. I need those files to prepare for discovery and trial which are substantially prejudiced without the files.

Further Affiant sayeth naught.

/s/ EUGENIE PARNAR
Defendant-Counterclaimant
Pro Se